United States Court of Appeals

for the Second Circuit

APPENDIX

77 7130

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

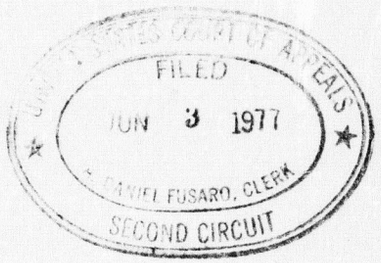
FLLI MORETTI CEREALI S.p.A.

Plaintiff-Appellee,

-against-

CONTINENTAL GRAIN COMPANY,

Defendant-Appellant.



ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
Attorneys for Appellant

BURLINGHAM, UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
Attorneys for Appellee

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208-1	76	0786	02	18	76	4	190	1	32		839.	0859	P	76	0786

PLAINTIFFS | DEFENDANTS | Ward,J.

FLLI MORETTI CEREALT S.p.A., | CONTINENTIAL ~~GRAIN~~ GRAIN COMPANY.,

wjf

CAUSE

Suit for credits owed to pltff on several sales etc.

ATTORNEYS

BURLINGHAM UNDERWOOD & LORD
~~25 Bway, NYC 10004~~ 422-7585
One Battery Park Plaza
NYC 10004

Bigham Englar Jones & Houston
~~99 John St., NYC 10038 732-4646~~
14 Wall St. NYC 10005 732-4646

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	FEB 18 1976	65858		JS-5	✓
				JS-6	

Flli M. Cereali Vs Continental Grain 76 C 786 RJW

Page #1

DATE	NR.	PROCEEDINGS
2-18-76		Fld Complt & Iss Summs.
2-18-76		Fld Order of Attachement...Ordered thatPltff's undertaking is fixed inthe sum of $80,000 of which amt the sum of $60,000 is conditioned that pltff will pay to daft if pltff was not entitled to an attachment of deft's property and the balance thereof, being the sum ofxxxx $20,000 conditioned that pltff will pay to the U.S. Marshal all of this allowable fees....Tenney, J.
2-18-76		Fld Notice that deft has interest in specified property.
2-18-76		Fld Undertaking on Attachment in the sum of $80,000---Bond#8070-24-51--by Fed. Ins.
2-23-76		Fld Pltff Notice of Motion for leave to prove grounds for Order of Attachment.....ret. 3-2-76 at 2:15PM Rm 518
2-20-76		Fld pltff's Affdvt by W. Swindell of service of Summs & Complt upon xRiffx Eidophor A.G. by H. Johannes on 2-13-76.
3-4-76		Fld Memo End on motiont fld 2-23-76....Motion granted. No Opposition. Settle Order on notice....Ward,J. mn
3-9-76		Fld Summs with Marshal's ret. Served: Continuntial Grain Co by G. Lepp on 2-25-76.
4-8-76		Fld Deft's Answer. BEJH
5-12-76		Fld Plta's Reply to Counterclaim. bul
5-18-76		Fld Consent Order Vacating Attachment entx 2-18-76...and Marshall release all property of deft....and the undertaking on attachment Bond#8070-24-51 for Fed Ins Co is cancelled....Ward,J.
5-26-76		Fld True Copy of Conset Order vacating attachment with Marshal's execution.
5-26-76		Fld " " " Notice that deft has interest in specified property with Marshal's ret. Serfed: Irving Trust Co by Mcommell on 2-18-76.
5-26-76		Fld true copy of Order of Attach. with Marshal's ret. Served: Irving Trust Co Connell on 2-18-76....and letter from Irving Trust that they are holding funds.
		PRE-TRIAL CONFERENCE HELD BY WARD, J.
6-25-76		
7-26-76		Filed pltffs notice of motion & Rule 9(g) statement for partial summary judgment. Ret. 8-3-76.
7-26-76		Filed pltffs memo of law in support of motion for partial summary judgment.
7-26-76		Filed affdvt by Remo Moretti , Managing Director of Fratelli Moretti Cereali S.p.A.
8-03-76		Filed Deft's Affdvt in Opposition to motion for partial summary judgment.
8-3-76		Filed Deft's Rule 9(g) Statement of Issues controverted and to be.
08-03-76		Filed Deft's Memo in opposition to motion for Partial summary Judgment.
8-5-76		Fld Stip & Order that pltff's motion for Part. Summ Judg. is adj to 9-[illegible]-76-Ward,J.
9-17-76		Filed Stip & Order adj. to 10-5-76 for return date of pltffs motion f partial summary judgment.....WARD,J.
10-4-76		Filed Stip & Order adj. to 10-19-76, pltffs motion for partial summary judgment.....WARD,J. /////// Con't on Page #2

DATE	PROCEEDINGS
10-12-76	Filed Stip & Order ext. to 11-30-76 pltffs motion for partial summary judgment.....WARD,J.
10-26-76	Filed change of address for pltffs atty.
12-1-76	Filed Stip & Order adj. to 12-14-76 pltffs motion for partial summary judgment.....WARD,J.
12-14-76	Filed pltffs reply affdvt in support of motion for partial summary judgment.
12-14-76	Filed pltffs reply memo of law in support of motion for partial summary judgment.
2-1-77	Filed Memo-End. on motion dtd 7-26-77. Motion granted in accordance with memorandum-decision filed herewith.....WARD,J. n/m
2-1-77	Filed Memorandum & Order. Pltff moves pursuant to Rules 54(b) & 56, for partial summary judgment on its first, & second causes of action. For the reasons stated, the motion is granted. In addition, the Court sua sponte grants summary judgment on the fourth cause of action.Although pltff has not moved to dismiss defts counterclaim, it is apparentfor the reason stated, it cannot sue on that contract here, & defts counterclaim is dismissed by the Court Sua sponte. Since summary judgment has been granted in pltffs favor on the first, second & fourth causes of action, & he has indicated that he will voluntarily dismiss the third cause of action & litigate it elsewhere, there is no reason why a final judgment should not be certifie Likewise, a stay of enforcement of pltffs judgment would be in appropriate. Settle judgment on notice.....WARD,J. n/m
2-8-77	Filed Judgment #77,267 & Order that pltff recover from deft on the first cause of action & on the second cause of action the aggregate total of $477,896.48. Ordered & Decreed that the counterclaim in the answer is dismissed with prejudice to def (Continental Grain Co.) but without prejudice to the pending arbitration proceedings in London, England between pltff & Continental Grain Export Corp.....WARD,J. Judgment Ent. 2-8-77, Clerk. n/m
2-8-77	Filed Order that on the subjoined consent of the parties, the third cause of action is dismissed without prejudice.....WARD,J
3-9-77	Filed Notice of Appeal by deft. Continental GrainCo. to the U.S.CA. for the 2nd circuit from the final judgement ent. in this action on 2-8-77. M/C.
4-11-77	Filed Original records transmitted from the USCA dtd 4-11-77
4-5-77	Filed deft's attys notice of change of address.

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-64)
(Formerly D.C. Form No.45a Rev. (6-49))

K-7

(Rec'd w/c Continental's Letter 2-27-76)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

K2477

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B. E. J. & H.

CIVIL ACTION FILE NO. _____

FLLI MORETTI CEREALI S.p.A.,

Plaintiff

v.

CONTINENTAL GRAIN COMPANY,

Defendant

76 CIV 786 RJW

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

BURLINGHAM UNDERWOOD & LORD

plaintiff's attorney , whose address

25 Broadway, New York, New York 10004

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Raymond F. Burghardt
Clerk of Court.

D. Harlson
Deputy Clerk.

Date: February 18, 1976

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

2-18-76

rn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CIV 786 RJW

FLLI MORETTI CEREALI S.p.A.,	:	Civil Action No.
Plaintiff,	:	
- against -	:	COMPLAINT
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	Plaintiff demands trial by jury.

Plaintiff by its attorneys Burlingham Underwood & Lord, for its complaint herein alleges on information and belief as follows:

1. Plaintiff is a corporation organized under the laws of Italy with no office in the United States.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The jurisdiction of the Court herein is founded on diversity of citizenship and the amount in controversy. 28 U.S.C. § 1332.

AS AND FOR A FIRST CAUSE OF ACTION

4. On January 15, 1976 defendant issued to plaintiff its Credit Note No. 9113 in the amount of $223,520.00, representing the net difference at $11.00 per metric ton in plaintiff's favor resulting from a sale by plaintiff to defendant in November 1974 of 20,320 metric tons of U.S. No. 2 hard winter wheat, at $175 per metric ton, for delivery at a U.S. port on the Gulf of Mexico in

December 1975, under defendant's purchase contract J-51881, and a sale by defendant to plaintiff of the same quantity of the same commodity for the same delivery at $164 per metric ton, under defendant's sale contract V-91534.

5. Defendant has not paid plaintiff the amount due under Credit Note No. 9113, although payment has been duly demanded.

6. Plaintiff is entitled to judgment against defendant in the amount of $223,520.00, plus interest from January 15, 1976.

AS AND FOR A SECOND CAUSE OF ACTION

7. On January 19, 1976 defendant issued to plaintiff its Credit Note No. 9118 in the amount of $225,866.96, representing the net difference at $11.1155 per metric ton in plaintiff's favor of a "circle settlement" on a sale by plaintiff to defendant in November 1974 of 20,320 metric tons of U.S. No. 2 hard winter wheat, at $175 per metric ton, for delivery at a U.S. port in the Gulf of Mexico in December 1975, under defendant's purchase contract J-51870.

8. Defendant has not paid plaintiff the amount due under Credit Note No. 9118, although payment has been duly demanded.

9. Plaintiff is entitled to judgment against defendant in the amount of $225,866.96, plus interest from January 19, 1976.

AS AND FOR A THIRD CAUSE OF ACTION

10. Defendant conducts its grain trading business in the Federal Republic of Germany through a company known as Deutsche Conti-Handelgesellscaft M.B.H.

11. On January 20, 1976 defendant, through Deutsche Conti-Handelgesellscaft M.B.H., agreed to pay to plaintiff on February 16, 1976 the sum of $390,000.00, representing the net difference in plaintiff's favor resulting from a sale by plaintiff to defendant in September 1975 of 25,000 long tons of U.S. No. 3 yellow corn, for delivery at a U.S. port on the Gulf of Mexico in February 1976, under defendant's purchase contract 53.915/10.130, and a sale by defendant to plaintiff in January 1976 of the same quantity of the same commodity for the same delivery, under defendant's sale contract 38.015.

12. Defendant has not paid plaintiff the amount due under the agreement dated January 20, 1976, although payment has been duly demanded.

13. Plaintiff is entitled to judgment against defendant in the amount of $390,000.00, plus interest from February 16, 1976.

WHEREFORE, plaintiff prays that it be granted judgment against defendant in the amount of $839,386.96 with interest and costs, and that plaintiff have such other and further relief as may be just and proper.

Dated: New York, New York
February 18, 1976

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff

By _____

25 Broadway
New York, N.Y. 10004
HAnover 2 - 7585

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B. E. J. & H.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI S.p.A.,	:	
Plaintiff,	:	Civil Action No. 76 CIV. 786 (RJW)
against	:	
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	ANSWER

Defendant, by its attorneys, BIGHAM ENGLAR JONES & HOUSTON, for its answer to the complaint herein respectfully alleges upon information and belief as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 3 of the complaint.

2. Defendant denies each and every allegation set forth in Paragraphs 6, 9, 10 and 12 of the complaint.

3. Defendant admits that on January 20, 1976, Deutsche Conti-Handelsgesellschaft agreed to pay to plaintiff on February 16, 1976 the sum of $390,000 as a result of the transactions set forth in Paragraph 11 of the complaint, but denies the defendant was a party to the agreement or any of said transactions.

4. Defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the complaint, except that defendant admits it has not made any payments to the plaintiff pursuant to the January 20, 1976 agreement between Deutsche Conti-Handelsgesellschaft and the plaintiff.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

5. On or about November 15, 1975, plaintiff and Continental Grain Export Corp. entered into a written agreement whereby Continental Grain Export Corp. agreed to sell and the plaintiff agreed to buy 50,000 long tons of United States solvent extracted Soybean Meal in bulk, 5,000 long tons to be shipped each month, November 1975 through and including August 1976.

6. Following a shipment in January, the plaintiff has not performed and has refused to perform any of the obligations on its part.

7. Continental Grain Export Corp., as a result of said repudiation, has a claim against the plaintiff which exceeds the amount plaintiff is claiming against defendant in this action.

8. Continental Grain Export Corp. has assigned said claim to the defendant.

COUNTERCLAIM

9. Defendant repeats and realleges as part of this claim each and all of the allegations contained in Paragraphs 1 and 3 of the complaint, with like effect as if herein fully repeated.

10. Defendant repeats and realleges as part of this claim each and all of the allegations contained in Paragraphs 5, 6, 7 and 8 of this answer, with like effect as if herein fully repeated.

11. The said agreement provided, inter alia:

"ARBITRATION

(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules, No. 125, of the Grain and Feed Trade Association Limited ...

(b) Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrators, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute."

WHEREFORE, defendant denies plaintiff is entitled to the relief prayed for in the complaint, or to any relief against defendant, and defendant prays for a stay of this action pending the completion of the arbitration of the claim herein made, and, following an award and appeal, if any, the defendant have judgment against the plaintiff for whatever amount, if any, an award in favor of the defendant exceeds the plaintiff's claim, or, alternatively, the dismissal of the complaint with costs to defendant.

Dated: New York,N.Y.
April 7, 1976

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant

By: _____
A Member of the Firm

Office and Post Office Address
99 John Street
New York, N.Y. 10038
Tel.: (212) 732-4646

A6-7

C 221—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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80 EXCHANGE PL. AT BROADWAY, N.Y.C. 10004

Index No.

76 Civ 786

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF N Y ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at BERGEN Co N.J.

That on APRIL 7 1976 deponent served the annexed ANSWER

on BURLINGHAM UNDERWOOD LORD
attorney(s) for
in this action at 25 BROADWAY NY NY

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me APRIL 8 1976

David Kraus

The same signed must be printed beneath

DAVID KRAUS

LEOPOLD R. LAPIERRE
Notary Public, State of New York
No. 31-2257035
Qualified in New York County
Commission Expires March 30, 1977

COPY RECEIVED
by hand
MAY 11 1976
Bigham, Englar, Jones & Houston

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI S.p.A.,	:	76 Civ. 786 RJW
Plaintiff,	:	
- against -	:	REPLY TO COUNTERCLAIM
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

Plaintiff, by its attorneys Burlingham Underwood & Lord, for its reply to the counterclaim herein, alleges on information and belief as follows:

1. Does not require a reply.

2. Does not require a reply.

3. Does not require a reply.

4. Does not require a reply.

5. It is admitted that on or about November 15, 1974 plaintiff and Continental Grain Export Corp. entered into contract V-88723/81U which speaks for itself.

6. Denied except it is admitted that in late January 1976 plaintiff received delivery and paid in full for approximately 21,280,000 pounds of soybeans under contract V-88723/81U.

7. Denied except it is admitted that Continental Grain Export Corp. has asserted a non-meritorious claim against plaintiff.

5-11-76

8. Denied for lack of knowledge and information sufficient to form a belief as to the accuracy of the allegations.

9. Does not require a reply.

10. Does not require a reply.

11. Does not require a reply as contract V-88723/81U speaks for itself.

WHEREFORE, plaintiff demands judgment against defendant dismissing the counterclaim and granting judgment in favor of plaintiff in the amount of $839,386.96 with interests and costs, and that plaintiff have such other and further relief as may be just and proper.

Dated: New York, New York
May 11, 1976

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff

By _____
A Member of the Firm
25 Broadway
New York, N. Y. 10004
HAnover 2 - 7585

GJm

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JUL 23 1976
Bigham, Englar, Jones & Houston

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI, S.p.A.,	:	
Plaintiff,	:	76 Civ. 786 RJW
- against -	:	NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

T O : BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
99 John Street
New York, New York 10038

S I R S :

PLEASE TAKE NOTICE that on August 3, 1976 at 2:15 P.M., or as soon thereafter as counsel may be heard, plaintiff will move this Court before the Hon. Robert J. Ward in Room 35 at the United States Court House, Foley Square, New York, New York 10007, for an order pursuant to F.R.C.P. 54(b), 56 and General Rule 9(g) granting Partial Summary Judgment in plaintiff's favor against defendant on the First and Second Causes of Action set forth in the Complaint and for such other and further relief as may be just and proper.

Dated: New York, New York
July 23, 1976

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff

By _____
[illegible] Broadway
New York, New York 1000[illegible]
HAnover 2 - 7505

EJm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

FLLI MORETTI CEREALI, S.p.A., :

Plaintiff, : 76 Civ. 786 RJW

- against - : PLAINTIFF'S RULE 9(c) STATEMENT OF UNDISPUTED MATERIAL FACTS

CONTINENTAL GRAIN COMPANY, :

Defendant. :

- X

1. Plaintiff is an Italian grain trading company and defendant is an American grain trading company.

2. On November 26, 1974, plaintiff entered into contract, J-51881/Rome No. 52-UA, for a sale to defendant of 20,320 metric tons of hard winter wheat at $175 per metric ton for delivery at a U.S. port on the Gulf of Mexico in December 1975. A true copy of that contract is annexed to the moving papers as Exhibit D.

3. On January 9, 1975, plaintiff entered into a second contract, V-91534/Grain Trading, Inc. No. 39778, for the purchase from defendant of the same winter wheat described in Contract J-51881/Rome 52-UA at $164 per metric ton. A true copy of this second contract is annexed to the moving papers as Exhibit E.

4. The first and second contracts (Exhibits D and E) both refer to certain terms of the revised North American Export Grain Association contract form No. 2 ("NAEGA 2"), a true copy of which is annexed to the moving papers as Exhibit F.

5. On January 15, 1976, defendant issued its Credit Note 9113 to plaintiff, obligating defendant to pay plaintiff $223,520.00 representing the net difference in plaintiff's favor between the first and second contracts (Exhibits D and E) at $11.00 per metric ton, to complete the "washout" of those contracts. A true copy of Credit Note 9113 is annexed to the moving papers as Exhibit G.

6. Defendant has not paid plaintiff the amount due under Credit Note 9113 although payment has been duly demanded.

7. On November 26, 1974, plaintiff entered into a third contract, J-51870/Rome No. 53-UA, for a sale to defendant of an additional 20,320 metric tons of hard winter wheat at $175 per metric ton for delivery at a U.S. port on the Gulf of Mexico in December 1975. A true copy of this third contract is annexed to the moving papers as Exhibit H.

8. On January 19, 1976, defendant issued its Credit Note 9118 to plaintiff, obligating defendant to pay plaintiff $225,866.96, representing the net difference in plaintiff's favor at $11.1155 per metric ton, as part of a "circle settlement" involving the third contract (Exhibit H). A true copy of Credit Note 9118 is annexed to the moving papers as Exhibit I.

9. Defendant has not paid plaintiff the amount due under Credit Note 9113 although payment has been duly demanded.

10. On November 15, 1974, plaintiff entered into a fourth contract for the purchase from Continental Grain

Export Corp. of 50,000 long tons of soybean meal. A true copy of this fourth contract is annexed to the moving papers as Exhibit L.

11. The soybean contract (Exhibit L) refers to certain terms in The Grain and Feed Trade Association contract form number 119 ("GAFTA No. 119"), a true copy of which is annexed to the moving papers as Exhibit M.

12. A dispute between the parties to the soybean contract (Exhibit L) is now the subject of pending arbitration in London before The Grain and Feed Trade Association.

Dated: New York, New York
July 23, 1976

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff

By _____

25 Broadway
New York, New York 10004
HAnover 2 - 7585

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Bigham, Englar, Jones & Houston

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI, S.p.A.,	:	76 Civ. 786 RJW
Plaintiff,	:	
- against -	:	AFFIDAVIT
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

CONSULATE OF THE UNITED STATES OF AMERICA
FLORENCE, ITALY) : ss.:

Republic of Italy
Province of Florence
City of Florence
Consulate of the United States of America, } SS.

REMO MORETTI, being first duly sworn, deposes on his oath and says that:

1. I am the Managing Director of Fratelli Moretti Cereali S.p.A., plaintiff herein, and I make this affidavit based on my own knowledge and upon information, found in plaintiff's files or furnished by other of plaintiff's employees and agent, which information I believe to be true.

2. Plaintiff is an Italian grain trading company.

3. Defendant is an American grain trading company.

4. This case involves three claims by plaintiff against defendant and a counterclaim by defendant against plaintiff arising from four separate transactions for the purchase and sale of wheat, corn and soybeans during 1974-1976.

5. Plaintiff commenced this suit on its three claims by Complaint filed on February 18, 1976, a true copy

of which is annexed hereto as Exhibit A. On the same day, upon plaintiff's application, this Court entered an order of attachment against defendant's property in the amount of $839,386.96. Thereafter, plaintiff and defendant agreed upon security, and on May 17, 1976 the Court entered a consent order vacating the attachment. On April 7, 1976 defendant filed its answer which included the counterclaim. A true copy of the Answer is annexed hereto as Exhibit B. Plaintiff responded to the counterclaim by a Reply dated May 11, 1976 which is annexed hereto as Exhibit C.

6. On November 26, 1974 plaintiff entered into contract J-51881/Rome No. 52-UA for a sale to defendant of 20,320 metric tons of hard winter wheat at $175 per metric ton. A true copy of this contract is annexed hereto as Exhibit D.

7. On January 9, 1975 plaintiff entered into contract V-91534/Grain Trading Inc. No. 39778 for the purchase of the same quantity and quality of wheat described in Contract J-51881/Rome No. 52-UA (Exhibit D) at $164 metric ton. A true copy of contract V-91534/Grain Trading Inc. No. 39778 is annexed hereto as Exhibit E.

8. Contracts J-51881/Rome No. 52-UA (Exhibit D) and V-91534/Grain Trading Inc. No. 39778 (Exhibit E) both refer to certain terms of the revised North American Export Grain Association contract form No. 2 ("NAEGA 2"). A true copy of NAEGA 2 is annexed hereto as Exhibit F.

9. On January 15, 1976 defendant issued its Credit Note 9113 to plaintiff, obligating defendant to pay plaintiff $223.520 to complete the "washout" reflected by contracts J-51881/Rome No. 52-UA (Exhibit D) and V-91523/Grain

Trading Inc. No. 39778 (Exhibit E). A true copy of Credit Note 9113 is annexed hereto as Exhibit G.

10. On November 26, 1974 plaintiff entered into contract J-51870/Rome No. 53-UA for the sale to defendant of an additional 20,320 metric tons of hard winter wheat at $175 per metric ton. A true copy of contract J-51870/Rome No. 53-UA is annexed hereto as Exhibit H.

11. On January 19, 1976 defendant issued its Credit Note 9118 to plaintiff, obligating defendant to pay plaintiff $225,866.96 as part of a "circle settlement" involving contract J-51870/Rome 53-UA (Exhibit H). A true copy of Credit Note 9118 is annexed hereto as Exhibit I.

12. On September 16, 1975 plaintiff entered into contract 53,915/10,130 for the sale to Deutsche Conti-Handelgesellschaft M.B.H. of 25,000 long tons of yellow corn at $131.50 per metric ton. A true copy of contract 53,915/10,130 is annexed hereto as Exhibit J.

13. On January 20, 1976 plaintiff entered into contract 38,015 for the purchase from Deutsche Conti-Handelgesellschaft of the same quality and quantity of corn described in contract 53,915/10,130 (Exhibit J). A true copy of contract 38,015 is annexed hereto as Exhibit K.

14. On November 15, 1974 plaintiff entered into a contract for the purchase of 50,000 long tons of soybean meal from Continental Grain Export Corp. A true copy of this contract is annexed hereto as Exhibit L.

15. The soybean contract (Exhibit L) refers to certain terms in The Grain and Feed Trade Association contract form number 119 ("GAFTA No. 119"), a true copy of which is annexed hereto as Exhibit M.

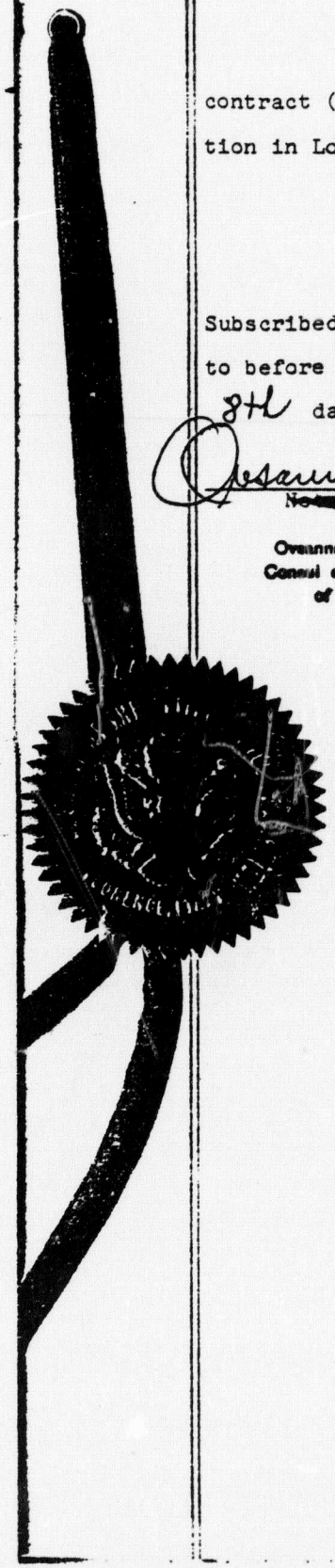
16. A dispute between the parties to the soybean contract (Exhibit L) is now the subject of pending arbitration in London before The Grain and Feed Trade Association.

James Wyeth

Subscribed and sworn
to before me this
8th day of July, 1976.

Ovsanna Harpootian

Ovsanna Harpootian
Consul of the United States
of America



Telefono Uffici 875957 - 8...
Abitaz. Sig. Remo: 8...
m. 303375 C.C.I.A. 2...
telex: 57629 MUCEREA...

J 51881

F.lli MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.
Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, 26th November 1974

CONTRACT

SELLERS : F.lli Moretti Cereali S.p.A. - SIGNA

BUYERS : Continental Grain ~~Export Corp~~ Company. - NEW YORK

BROKER : Messrs. Renzo & Riccardo Lenzi S.n.c. - FLORENCE

QUANTITY : LT. 20.000= (twentythousand long tons) 5% more or less at Vessel's option (tolerance as per NAEGA N°2)- in bulk -

QUALITY : US Nr. 2 or better HARD WINTER WHEAT, ordinary protein - Official Inspection Certificate at shipment final as to grade/quality and conditions as to prevailing U.S. Grain standards. Bill of Lading weight final as per Official Weight Certificate -

SHIPMENT : as per Bill(s) of Lading to be dated 1/31 December 1975 any 20 days at Buyers' option to be declared by November 1st, 1975 -

PRICE : US.$ 175,00= (one hundred seventyfive dollars) per 1.000 Kilos - FOB one safe Gulf port at Sellers' option - neither stowed nor trimmed (stowing and/or trimming expenses to be for Buyers' account) -

PAYMENT : Against presentation of documents in New York by telegraphic transfer at Buyers' expenses -

OTHER CONDITIONS : Buyers to provide 15 days preadvice of vessel readiness to load - Overtime at the elevator for Buyers' account according to the Official Rate -
Carrying charges beyond shipment period until vessel completes loading for Buyers' account - Carrying charges as per NAEGA N°2 revised -
If and when USDA requires declaration of final destination then Buyers to declare such to Sellers within 48 hours from Seller's request -

./.

EXHIBIT D

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875[illegible] - 876[illegible]
Autoz. Sig. Remo: 875[illegible]
m. 303375 C.C.I.A. 24[illegible]
telex: 57629 MOCEREA[illegible]

F.lli MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.

Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, 26th November 1974

CONTRACT MORETTI / CONTINENTAL - 2nd part -

OTHER CONDITIONS : Buyers state that the commodity covered hereunder is for direct use, consumption or disposition outside the United States -
In the event this contract is or becomes ineligible for any export licence or shipment of all or part of the contract quantity is ineligible for export due to Government action of any nature, Sellers shall not be responsible to Buyers for damages and any eligible part shipment shall b accepted by Buyers at contract price. Any export tax duty or licence fee or similar charges shall be for Buyers' account -
Payment shall not be made in funds made available as a result of financing by the US Government or any agency thereof of sales of agricultural commodities for foreign currency pursuant to Title I PL 480. Buyers declare to accep commercial invoices and B/L with the following clause " United States Law prohibits dispositions of commodities to the North Korea, Communist controlled areas of Vietnam Cuba and Southern Rhodesia unless otherwise authorised by the United States".

This contract is made upon the terms, conditions and rule including the arbitration clause, contained in Form N° 2 of the NAEGA (of which the parties admit that they have knowledge and notice) not in contradiction with the above and the details above given shall be taken as having been written into such form in their appropriate place.
Buyers and Sellers expressly accept the compromissory clause and arbitration rules 2 of the NAEGA -

BUYERS:

CONTINENTAL GRAIN CO

James R. Ford TM

SELLERS:

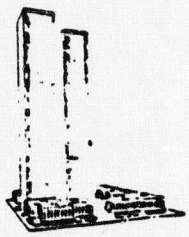
[signature]

17

GRAIN TRADING INC.
ONE WORLD TRADE CENTER, SUITE 1637, NEW YORK, N.Y. 10048

TELEPHONE
(212) 432-0060
CABLE ADDRESS
TRADGRAIN

TELEX
WUI 62786
RCA 232466
ITT 420434



CONTRACT NO. 39778
DATE: January 9, 1973

SELLER: Continental Grain Export Corporation
2 Broadway
New York, New York 10004

BUYER: Moretti Fredi S.p.A.
Via Alberti 72
5058 Signa (Florence), Italy

MATERIAL: No. 2 U.S. HARD WINTER WHEAT, Ordinary protein

QUANTITY: 20,000 Long Tons + 5 % more or less, as per NAFGA No.2 revised. This tolerance to be applicable to the unshipped balance only.

SHIPMENT: Any 20 days December 1973, to be narrowed by the buyer latest on November 1st, 1973

PRICE: $163.90 per metric ton (1,000 kilos) FOB vessel ex spout one safe Gulf port, at seller's option, not stowed, not trimmed

INSURANCE: To be covered by buyers and to attach at such time as grain leaves elevator spout. Such insurance to cover sellers/buyers, as their interest may appear

PAYMENT: Net cash against first presentation of shipping documents in New York, by telegraphic transfer in sellers' favour

WEIGHTS and GRADES: Official Weight and Grade Certificates final at time and place of shipment

PACKING: In bulk

REMARKS: Buyers to give sellers fifteen days' notice of vessel's readiness to load.

EXHIBIT E

CONTRACT NO. 30778
DATE: January 9, 1975

REMARKS: Overtime charges, if any because vessel or port authorities require vessel to load in overtime to be for buyers' account.

In case Bill of Lading is not at sellers' disposal within a maximum of one working day after Bill of Lading date for reasons beyond sellers' control, buyers to pay to sellers an interest as per Naega contract form No.2 revised over New York prime rate in force on date of payment on invoice value. Interest to be computed from the working day after Bill of Lading date up to the date the Bill of Lading is remitted to the sellers or their representatives.

Otherwise as per NAEGA No.2 revised.

In the event this contract is or becomes ineligible for any export license or shipment of all or part of the contract quantity is ineligible for export due to government action of any nature, sellers shall not be responsible to buyers for damages and any eligible part shipment shall be accepted by buyers at contract price.

Any export tax duty or license fee or similar charges shall be for buyers' account.

Buyers agree to accept shipping documents clausedd:
USA LAW PROHIBITS DISPOSITION OF THESE COMMODITIES TO NORTH KOREA, SOUTHERN RHODESIA OR COMMUNIST CONTROLLED AREAS OF VIETNAM OR CUBA, UNLESS OTHERWISE AUTHORIZED BY THE UNITED STATES.

Vessels which have sailed from any Cuban port on/or after January 1st 1963 and/or a North Vietnam port on/or after January 25th 1966 cannot be nominated to load grain sold under this contract.

MORETTI EREDI S.p.A.

BY: -----

CONTINENTAL GRAIN EXPORT CORPORATION

BY:

GRAIN TRADING INC.

BY:

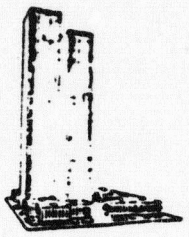
No vessels that have sailed from any Cuban port on or after January 1, 1963 and that have sailed from any North Vietnam Ports on or after January 25, 1966 may be nominated on this contract.

GRAIN TRADING INC.

ONE WORLD TRADE CENTER, SUITE 1637, NEW YORK, N.Y. 10048

TELEPHONE
(212) 432-0060
CABLE ADDRESS
TRADGRAIN

TELEX
WUI 62786
RCA 232466
ITT 420434



AMENDMENT
to
CONTRACT No. 39778

DATE: February 28, 1975

It is hereby agreed and understood that the clause PRICE of the above mentioned contract should read:

$164.00 per metric ton (1,000 kilos).

All other stipulations of this clause, as well as all other clauses of the contract to remain unchanged.

MORETTI EREDI S.p.A.

BY:_____
BUYER

CONTINENTAL GRAIN EXPORT CORPORATION

BY:_____
SELLER

GRAIN TRADING INC.

BY:_____
AS AGENTS ONLY

NORTH AMERICAN EXPORT GRAIN ASSOCIATION

FREE ON BOARD EXPORT CONTRACT U.S.A./CANADA

ISSUED NOVEMBER 15th, 1973. **No. 2**

Contract No. _____

New York _____ 19____

Bought of _____

Sold to _____

ON THE CONDITIONS AND RULES INCORPORATED HEREIN

Quantity _____

in bulk, including dockage, 2% more or less at vessel's option at contract price. In the event of the quantity contracted for being for a full and complete cargo/es, vessel has the option of calling for up to 5% more or less, any excess or deficiency over 2% to be settled at the FOB value on the date of last bill of lading, such value to be fixed by arbitration unless mutually agreed. If contract price is to be established basis an exchange of futures, the contract becomes a flat price contract on exchange of futures to the nearest 5,000 bushels of the mean contract quantity, any excess or deficiency from the mean quantity to be settled at the FOB value on the date of the last bill of lading. Tolerance applicable to unshipped balance only.

Commodity _____

_____

In accordance with the official grain standards of the United States or Canada, whichever applicable, as in effect on contract date.

Weight Quantity to be final at port/s of loading in accordance with customary weight certificate/s. 1016 kilos shall be equal to 2,240 lbs.

Quality Quality and condition to be final at port/s of loading in accordance with official inspection certificate/s.

In case of delivery at St. Lawrence port/s, quality and condition to be final in accordance with Lake and/or loading port/s official inspection certificate/s; Lake inspection certificate/s to be properly identified at port/s of shipment.

Delivery of higher grade/s of grain of the same type and description permissible.

The grain is not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding.

Delivery Delivery between the dates of _____ and _____, both inclusive, at discharge end of loading spout, to buyer's tonnage in readiness to load, in accordance with custom of the port/s but always subject to elevator tariff/s.

Buyer to give vessel nomination/s in writing in time for seller to receive minimum _____ days notice of probable readiness of tonnage and quantity/ies required. Buyer to keep seller informed of changes in expected date/s of vessel readiness. Vessel nomination/s are irrevocable unless seller agrees to accept substitution. For sales of commodities of U.S. origin, buyers may not nominate any vessel which has called at a Cuban port on or after January first, 1963, and/or a North Vietnam port on or after January 25, 1966, or which will do so prior to delivery of the goods.

Bill of lading and/or mate's receipt to be considered proof of date of delivery. Any delivery in part fulfillment of this contract to be considered as if made under a separate contract.

Price _____

free on board buyer's tonnage at _____

_____

If contract price is to be established basis an exchange of futures, such exchange to be completed at the latest seven (7) calendar days prior to the last trading day of the applicable futures month or seven (7) calendar days prior to expected readiness of vessel to load, whichever is earlier.

Payment Net cash by irrevocable divisible letter/s of credit issued or confirmed by a prime U.S. bank in New York (or _____ by mutual agreement) in exchange for shipping documents per rule 8 herein (or in exchange for warehouse receipt/s when same tenderable under rule 4 herein). Such letter/s of credit, in a form acceptable to seller, to be established within 5 days of seller's request and in no case later than 5 days prior to the beginning of the delivery period; the letter/s of credit must be valid till the 30th day after expiration of the delivery period; should delivery be delayed beyond contracted delivery period, buyer, if requested by seller, to amend letter/s of credit to permit delivery within the following 60 days and buyer to increase amount of credit to provide for carrying charges.

Insurance Marine and war risk (including strikes, riots, civil commotions and mine risk) insurance, covering seller's/buyer's interests as they may appear, to be covered by buyer in first-class approved companies and/or underwriters and confirmed by the latter to the seller at least five days prior to the expected readiness of the vessel. If such confirmation is not received by the seller by such time, seller may place such insurance for buyer's account and at buyer's risk and expense.

EXHIBIT F

_____ (Buyer) _____ (Seller)

(SEE CONDITIONS AND RULES ON OTHER SIDE)

CONTINENTAL GRAIN COMPANY

277 PARK AVENUE
NEW YORK, N.Y. 10017

CREDIT NOTE

Date: JANUARY 15, 1976 Number: 9113

50414
TO: F. LLI MORETTI DI ISIDORO
LASTRA A. SIGNA
FIRENZE, ITALY

(1255A)

We CREDIT your account as follows:			Amount
WASHOUT OF 20,000 L/T, EQUAL TO 20,320 M/T			
U.S. NO. 2 HARD WINTER WHEAT			
DECEMBER 12/31, 1975 SHIPMENT PERIOD			
BASIS FOB VESSEL ONE SAFE GULF PORT			
OUR PURCHASE FROM YOU CT. J-51881/			
ROME NO. 52-UA	@	$175.00 PER M/T	
OUR SALE TO YOU CT. V-91534/			
GRAIN TRADING INC. NO. 39778	@	164.00 PER M/T	
		$ 11.00 PER M/T	
ON 20,320 M/T			
		DUE YOU =	$ 223,520.00

Continental Grain Company

By _____

EXHIBIT G

CO-19

J51870

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875757 - 875...
Abitaz. Sig. Remo: 87565...
m. 303375 C.C.I.A. 2...
telex: 57629 MOCEREA...

F.lli
MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.
Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, 26th November 1974

CONTRACT

SELLERS : F.lli Moretti Cereali S.p.A. - SIGNA

BUYERS : Continental Grain ~~Export Corp~~ Company. - NEW YORK

BROKER : Messrs. Renzo & Riccardo Lenzi S.n.c. - FLORENCE

QUANTITY : LT. 20.000= (twentythousand long tons) 5% more or less at vessel's option (tolerance as per NAEGA N°2) in bulk -

QUALITY : U.S. Nr. 2 or better HARD WINTER WHEAT, ordinary protein - Official Inspection Certificate at shipment final as to grade/quality and conditions as to prevailing U.S. Grain Standards. Bill of Lading weight final as per Official Weight Certificate -

SHIPMENT : As per Bill(s) of Lading to be dated 1/31 December 1975 - any 20 days at Buyers' option to be declared by November 1st, 1975 -

PRICE : US.$ 175,00=(one hundred seventyfive dollars) per 1.000 K FOB one safe Gulf port at Sellers' option - neither stowed nor trimmed (stowing and/or trimming expenses to be for Buyers' account) -

PAYMENT : Against presentation of documents in New York by telegraphic transfer at Buyers' expenses -

OTHER CONDITIONS : Buyers to provide 15 days preadvice of vessel readiness to load - Overtime at the elevator for Buyers' account according to the Official Rate -
Carrying charges beyond shipment period until vessel completes loading for Buyers' account - Carrying charges as per NAEGA N°2 revised -
If and when USDA requires declaration of final destination then Buyers to declare such to Sellers within 48 hours from Seller's request -

./.

EXHIBIT H

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875657 - 876007
• Abitaz. Sig. Remo: 875652
m. 303375 C.C.I.A. 244383
telex: 57029 MOCEREAL

F.lli
MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.
Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, 26th November 1974

CONTRACT MORETTI / CONTINENTAL - 2nd part -

OTHER CONDITIONS : Buyers states that the commodity covered hereunder is for direct use, consumption or disposition outside the United States -
In the event this contract is or becomes ineligible for any export licence or shipment of all or part of the contract quantity is ineligible for export due to Government action of any nature, Sellers shall not be responsible to Buyers for damages and any eligible part shipment shall be accepted by Buyers at contract price. Any export tax duty or licence fee or similar charges shall be for Buyers' account -
Payment shall not be made in funds made available as a result of financing by the US Government or any agency thereof of sales of agricultural commodities for foreign currency pursuant to Title I PL 480. Buyers declare to accept commercial invoices and B/L with the following clause "United States Law prohibits dispositions of commodities to the North Korea, Communist controlled areas of Vietnam, Cuba and Southern Rhodesia unless otherwise authorised by the United States".

This contract is made upon the terms, conditions and rules, including the arbitration clause, contained in Form N° 2 of the NAEGA (of which the parties admit that they have knowledge and notice) not in contradiction with the above, and the details above given shall be taken as having been written into such form in their appropriate place.
Buyers and Sellers expressly accept the compromissory claus and arbitration rules 2 of the NAEGA -

BUYERS:

CONTINENTAL GRAIN CO
James R. Bond

SELLERS:

CONTINENTAL GRAIN COMPANY

277 PARK AVENUE
NEW YORK, N.Y. 10017

CREDIT NOTE

Date: JANUARY 19, 1976 Number: 9118

50414
TO: F. LLI MORETTI DI ISIDORO
LASTRA A SIGNA
FIRENZE, ITALY

(1272A)

We CREDIT your account as follows:	Amount
CIRCLE SETTLEMENT ON 20,000 L/T OR 20,320 M/T U.S. NO. 2 HARD WINTER WHEAT DECEMBER 12/31, 1975 SHIPMENT PERIOD BASIS FOB VESSEL ONE GULF PORT	
SEQUENCE	
COOK/PAGNAN @ $141.00 PER M/T	
PAGNAN/IAKA @ $143.75 PER M/T	
IAKA/BREMER @ $149.00 PER M/T	
BREMER/MOR[illegible] @ $161.00 PER M/T	
MORETTI/CO[illegible] @ $175.00 PER M/T (CT. J-51870/ROME NO. 53-UA)	
CONTI/KANSAS CITY @ $141.4698 PER M/T (CT. V-19316/PM 04640)	
KANSAS CITY/CONTI @ $164.160 PER M/T (CT. H-68751/05592)	
CONTI/COOK @ $163.8845 PER M/T (CT. V-16855/MAY NO. 5644)	
IT HAS BEEN AGREED THAT WE PAY YOU $11.1155 PER M/T ON 20,320 M/T	
DUE YOU =	$225,866.96

MJ/cm

Continental Grain Company

By _____

EXHIBIT 1

20-19

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875957 - 876007
• Abitaz. Sig. Renzo: 875652
m. 303375 C.C.I.A. 244303
telex: 57629 MOCEREAL

MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.
Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, 16th September 1975

C O N T R A C T

SELLERS : Messrs. F.lli Moretti Cereali S.p.A. - SIGNA

BUYERS : Messrs. Deutsche Conti Handelsgesellschaft M.B.H. - HAMBURG

BROKERS : Messrs. Renzo & Riccardo Lensi S.n.c. - FLORENCE

QUANTITY : L.T. 25.000= (twenty five thousand) of 1.016 Kilos each, 5% more or less as per NAEGA N.2 quantity.-

COMMODITY : N.3 US YELLOW CORN; 15,5% maximum moisture.
Quality and condition final as per Official Inspection Certificate at loading port.-

PACKING : in bulk.-

SHIPMENT : February 1976, any twenty days to be narrowed by the Buyers latest January 1st, 1976.-

PRICE : US.$ 131,50=(one hundred thirtyone dollars 50 cents) per 1.000 Kilos F.O.B. one Gulf port at Sellers' option, neither stowed nor trimmed at the end of loading spout.-

PAYMENT : Cash on presentation and against shipping documents in New York, by telegraphic transfer in favour of Sellers. Should Buyers not effect payment within 48 hours from presentation of shipping documents, Sellers will charge interests at 2,5% over the published New York prime rate. In case Bill of Lading is not at Shippers' disposal in maximum one working day after Bill of Lading date for reasons beyond Sellers' control, Buyers have to pay Sellers interests at 2,5% over New York prime rate on the invoice value.-

WEIGHT : Bill of Lading weight final at loading as per Weight certificate.-

QUALITY AND CONDITIONS : Final at loading as per Official Inspection Certificate issued at loading port.-

../..

EXHIBIT J

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875957 - 876007
Abitaz. Sig. Remo: 875442
m. 383375 C.C.I.A. 244383
telex: 57629 MOCEREAL

MORETTI CEREALI S.p.A.

Capitale Sociale L. 400.000.000 int. vers.

Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, ..16th September 1975 ...

REMARKS : Buyers have to give 15 (fifteen) days notice of readiness to load. Import licence, if required, for Buyers' account.-

SPECIAL CONDITIONS :-Subject to any government control measures including export licence, if required, and taxes and/or similar measures for Buyers' account.-

-The within goods have to be loaded in maximum two vessels.-

-Demurrage/Despatch as per Charter Party for Sellers' account at loading, but max. US.$ 5.000=/2.500=. If Charter Party is not at Sellers disposal prior vessel loading, Sellers not to be responsible for any demurrage accrued.-

-Buyers have to give instructions to Sellers in due time as to where documents to be presented.-

-Carrying charges : 1/10 cent/bushel/day for the first ten days, 1/5 cent/bushel/day thereafter, plus interest at the 2,5% rate over New York prime rate.-

-Sellers guarantee a loading rate of L.T. 5.000=(five thousand) per weather working day - Sundays/holidays excluded and Saturdays as per Baltimore Form "C" - C/P clause -. Time to start counting as per Baltimore Form "C" - C/P clause -.-

- Loading guarantee to apply only for loading on selftrimming bulk carrier but excluding time used for eventual loading in deep/wing tanks.-

-No tanker to be nominated against this contract.-

-All overtime assessed by Elevator and stevedores for Buyers' account.-

-U.S.A. government law concerning export prohibition to Communist bloc shall be observed by Buyers but otherwise no restriction to apply.-

-If the port or Elevator is on strike at time vessel arrives presents and is accepted time not to start till 7.00 a.m. on the next regular straight time working day after strike ends.-

-Buyers have not to request fumigation and/or any other chemical treatment of cargo and/or vessel at loading.-

..../..

Telegrammi - Cables: Moretti Cereali - SIGNA
Telefono Uffici: 875957 - 876007
• Abitaz. Sig. Remo: 875652
m. 303375 C.C.I.A. 244383
telex: 57629 MOCEREAL

MORETTI CEREALI S.p.A.
Capitale Sociale L. 400.000.000 int. vers.
Via degli Alberti, 72 50058 SIGNA (Firenze)

Li, ...16th September 1975

OTHER CONDITIONS : All other conditions and arbitration according to the NAEGA N.2 contract revised November 15th, 1973.-

Arbitration clause : all disputes arising out of or under this contract shall be refferred to arbitration in accordance with the arbitration clause and rules contained in the NAEGA contract N.2 revised November 15th, 1973 (of which the Parties admit that they have knowledge and notice).-

BUYERS:

DEUTSCHE CONTI
Handelsgesellschaft m.b.H.
2 Hamburg 13 - Mittelweg 4

SELLERS:

DEUTSCHE CONTI-HANDELSGESELLSCHAFT
M. B. H.
2 HAMBURG 13 · MILCHSTRASSE 4

DEUTSCHE CONTI-HANDELSGES.M.B.H., 2 HAMBURG 13, P. O. BOX 132065

TELEFON (PHONE) (0401) 44 19 41
FERNSCHR. (TELEX) 02-11274
TELEGR. (CABLE ADDRESS) FRISTRADE

Messrs. Flli Moretti Cereali
S.P.A.
Via degli Alberti 72

I-50058 SIGNA/FIRENZE
ITALY

KONTRAKT
CONTRACT

NO.	DATUM/DATE
38.015	20.1.1976/msch.

Wir bestätigen hiermit den folgenden Abschluß:
We confirm herewith the following transaction:

Verkäufer / Sellers: DEUTSCHE CONTI-HANDELSGESELLSCHAFT M.B.H., 2 HAMBURG 13
Käufer / Buyers: Flli Moretti Cereali S.P.A., Signa
Vermittler / Intermediary: Eurograin Handelsgesellschaft mbH., 2 Hamburg 11, Ost-West-Str. 65
Menge / Quantity: 25.000 long tons of 1.016 kilos each
5 % more or less as per NAEGA No. 2 quantity

Ware / Commodity: U.S. NO. 3 (THREE) YELLOW CORN
max. 15,5 % moisture
Quality and condition final as per Official Inspection Certificate at loading port

Abladung / Shipment: February 1976, any 20 days to be narrowed by the buyers latest January 1st, 1976 - 15 days loading notice -

Preis / Price: US-$ 390.000,-lumpsum to be paid February 16th, 1976 as Wash-out against ctr. 53.915/10.130 dated September 16, 1975.

Parität / Parity: FOB ONE GULF PORT

Verpackung / Packing: in bulk

Zahlung / Payment: Net cash against documents

Besondere Bedingungen / Further Conditions:

Kontrakt / Contract: NAEGA 2

Schiedsgericht / Arbitration: New York

Senden Sie bitte das beigefügte Duplikat dieses Kontraktes gegengezeichnet zurück.
Kindly sign and return the attached duplicate of this contract.

DEUTSCHE CONTI-HANDELSGESELLSCHAFT M.B.H.

GESCHÄFTSFÜHRER: RICO A. STROEMER, FRANZ H. LE CLAIRE, WILHELM MAHNKE, POUL SCHRØ...
AMTSGERICHT HAMBURG REG.-NR. B 7...

818

EXHIBIT K

1. With additions/deletions as deposited at the Registry of the District Court of Rotterdam on August 20, 1959 by Het Comité van Graanhandelaren, Rotterdam.

2. Sellers have the option to ship in tanker/s and/or in oil compartments of oil/ore carriers. If shipped in tanker/s and/or oil/ore carrier/s, Rye Terms as per GAFTA 41 to apply, but only for damaged goods which are discharged as such.

3. Sellers have the option to ship per new tanker/s and/or tankers which carried grain the previous voyage and/or in the oil tanks of oil/ore carrier/s, Rye Terms as per GAFTA 41 to apply but only for damaged goods which are discharged as such.

4. Sellers have the option to ship per tanker/s including oil/ore carrier/s in which case soyabeans arriving in damaged condition and discharged as such shall be taken with an allowance to be agreed either amicably or by arbitration. The damaged beans shall be sampled jointly by buyers' and sellers' representatives. Sellers to supply together with the documents survey-report or certificate stating that the tanks/holds were clean and suitable for transportation of soyabeans at time of loading.

5. If loaded at an USA port, but reshipped in an ocean vessel at a Canadian/Great Lakes/St.Lawrence River port, sellers to supply an additional certificate of the Authorities of that port, showing identification with the USA Lake port Federal Appeal Grade Certificate and details of stowage in the ocean vessel or in lieu thereof a Commodity Inspection Certificate of the U.S. Department of Agriculture may be furnished.

6. Sellers have the option of shipping the whole or part of the quantity in excess of 15% in bags, in which case the excess over 15% shall be delivered in bulk and sellers shall be responsible for cutting the excess bags which remain their property.

7. Official Inspection Certificate at time of loading into the ocean carrying vessel to be final as to quality.

8. Destination Control Clause, Restricted Funds Clause and Export Control Regulations of the U.S. Bureau of Foreign Commerce and U.S. Department of Agriculture to apply, buyers to comply with any regulations of the United States/Canada now in force or that may subsequently be put in force governing this commodity. Buyers state that the commodity covered hereunder is for direct use, consumption or disposition outside the United States.

9. For sampling, analysis and arbitration, buyers to stand in with a larger quantity.

10. Pro-rata clause as per GAFTA 30 to apply.

11. Payment net cash in US-$ on presentation of and in exchange for shipping documents and/or delivery order/s by telegraphic transfer to beneficiary/ies to be nominated by sellers. Cable expenses for buyers' account. If required by sellers buyers to pay the full cif-value on presentation, provided that freight has been paid.

12. Discharge as per custom of the port or as per B/L and/or C/P or as per conditions of the regular liners or as fast as vessel can deliver.

13. All import duties and/or other kind of taxes now and in future for buyers' account.

14. For wheat sales only:

    This wheat is sold on the conditions that it will not be re-entered into the United States (including Puerto Rico) or Canada. Should such re-entry occur for any cause, buyers agree to reimburse sellers without delay for any damages including penalties as incurred by sellers in connection with any applicable laws or regulation of the United States or Canada.

BEST COPY AVAILABLE

ROMA MILANO | TELEGRAMMI: PRIMITAL | TELEX | ROMA 61061 MILANO 31001

COMPAGNIA CONTINENTALE ITALIANA
SOCIETÀ PER AZIONI - CAPITALE L. 25.000.000

SEDE LEGALE: 00198 ROMA - VIA TEVERE, 1/A - TEL. 867.542/3-415 - C.C.I.A. ROMA N. 166370 - TRIB. DI ROMA N. 266/51
UFFICIO COMMERCIALE: 20123 MILANO - VIA S. ORSOLA, 3 - TEL. 89.21.17 - 86.12.03

UFFICIO DI Rome, 15.11.1974

C O N T R A C T N. V-88723/81 U

SELLERS	CONTINENTAL GRAIN EXPORT CORP./NEW YORK
BUYERS	Messrs. MORETTI DI ISIDORO/LASTRA A SIGNA -
BROKERS	Compagnia Continentale Italiana/Rome and Messrs. Renzo & Riccardo Lenzi/Flore
COMMODITY	U.S. Solvent extracted Soybean Meal - in bulk -
QUALITY	Minimum 44% protein/fat, maximum 7.5% fiber. Maximum 12.5% moisture. Allowances for quality specifications to be as follow Protein/Fat: 1% to 1% Fiber: 7.5% to 8% - 1% to 1% Over 8% to 8.5% - 2% to 1% Over 8.5% - NSPA rules to apply Moisture: - 1% to 1%
QUANTITY	50,000 Long Tons of 2240 pounds each, tolerance as per NAEGA 2 -
PRICE	U.S. Doll. 200.- (twohundred Dollars) per metric ton, basis bulkcarrier. If tween decker is used, U.S. Doll. 0.40/TM Premium -
BASIS	FOB ONE GULF PORT, stowed and trimmed. Port at Seller's option and to be decl red on nomination of vessel.
SHIPMENT	November/December, 1975/January/February/March/April/May/June/July/August, 19 5,000 Long Tons each, with 15 days presdvice of vessel's name and date of rea ness to load.
WEIGHT	Bill of Lading weight final. If shipment from Baton Rouge, interior weight l 5/8 of 1% to be final.
ANALYSIS	Final at loading as per analysis certificate -

./.

EXHIBIT L

COMPAGNIA CONTINENTALE ITALIANA

(Ct. N. V-88723/81 U of 15.11.74 - Buyers: MORETTI/Lastra a Signa)

PAYMENT	Net cash against presentation of documents in New York. In case of late payment buyers agree to pay to sellers interest on invoice value at the rate of 1.5% over prime New York rate in force on date of payment -
LOADING RATE	Load rate to be 2,000 Tons per weather working day of 24 consecutive hours, Sundays and Holidays excluded. Time to count and Saturdays as per Baltimore Form C Charter Party. Any overtime as ordered by elevator or port authorities to be for Buyer's account. Carrying Charges to be U.S. $ 0.10 (ten cents) per ton per day plus interest at the rate of 1½% over the prime New York rate. Demurrage/Despatch as per Charter Party -
SPECIAL TERMS	1) In case Bill of Lading is not at seller's disposal within a maximum of one working day after Bill of Lading date for reasons beyond Seller's control, Buyers to pay sellers interest at the rate of 1½% per annum over prime New York rate in force on date of payment of invoice value. Interest to be computed from the working day after Bill of Lading date up to the date the Bill of Lading is remitted to the sellers or their representatives. 2) Vessels which have sailed from Any Cuban or North Vietnam port(s) on or after January 1, 1963, cannot be nominated to load meal under this contract. 3) United States Law prohibited disposition of these commodities to North Korea, Communist controlled areas of Vietnam, Cuba, or Southern Rhodesia. Unless otherwise authorized by the United States. Buyer acknowledges his understanding that the sanction of denial of trading privileges in U.S.A. exports may be imposed for violation of this export regulation.
OTHER CONDITIONS	Payment to be made net cash on presentation of and in exchange for first arriving copy/ies of Bill/s of Lading, together with sellers guarantee for missing Bill/s of Lading, if any, and/or delivery orders and policies and/or certificate of insurance. DOCUMENTS CLAUSE: If any documents whatsoever required to be with the clauses and conditions of the contract and/or if such document contains errors or omissions of any kind the Buyer must nevertheless perform and take up the documents if the seller gives written or cable notice to the Buyer that sellers guarantee performance in accordance with the clauses and conditions of the contract.

./.

COMPAGNIA CONTINENTALE ITALIANA

3.-

(Ct. N. V-83723/81 U of 15.11.74 - Buyers: MORETTI/Lastra a Signa)

Port duties and/or taxes if any, to be for Buyers account and import licence, if required, to be obtained by Buyers.

SPECIAL CONDITIONS

In a case Carrying charges of main shippers for the new crop will be Doll. 0.15/ton, Buyers agree to pay it plus interests as per Naega 2 revised Nov. 15, 1973.

WAR DEVIATION CLAUSE: Buyer agrees to accept documents containing the Chamber of Shipping War Deviation Clause and/or other recognized official war risk clause.

ARBITRATION CLAUSE: all disputes arising out of or under this contract shall be referred to arbitration in accordance with the arbitration clause and rules in the below mentioned contract form.

This contract is made upon the terms, conditions and rules, including the arbitration clause and rules, in contract form n. 119 of the GAFTA in force at date of contract.

SELLERS

As Agents Only
Compagnia Continentale Italiana S.p.A.

BUYERS

THE GRAIN AND FEED TRADE ASSOCIATION
LIMITED

BALTIC EXCHANGE CHAMBERS, 28 ST. MARY AXE, LONDON, EC3A 8EP
(Affiliated to the London Chamber of Commerce)

No. 119

Copyright

GENERAL CONTRACT F.O.B. TERMS FOR GOODS IN BAGS OR BULK

LONDON _____ 19____

WE have this day _____

1. GOODS _____
If in bags, in new and/or secondhand bags of suitable strength to stand ordinary wear and tear to port of destination. Bags of each mark shall be of uniform weight and shall be properly marked.
If in bulk, Buyers may call for up to 15% in stowage bags, such bags to be taken and paid for as Goods and any cutting to be paid for by Buyers. Buyers have the option of calling for an additional quantity to be shipped in bags, in which case they shall be responsible for providing the extra bags and for any additional costs incurred, but shall not be required to pay for the extra bags as goods.

2. QUANTITY _____
tons of 1,000 kilos / 1,016 kilos or 2,240 lbs. each up to 5% more or less at Buyers' option.

3. PRICE & TERMS—At _____
per ton of 1,000 kilos / 1,016 kilos or 2,240 lbs. delivered Free On Board _____
in sound condition.

4. BROKERAGE _____ % of the contract price to be paid by Sellers on the mean contract quantity, goods lost or not lost, contract fulfilled or not fulfilled, unless such fulfilment is due to the successful application of the Prohibition Clause. Brokerage shall be due on the day shipping documents are exchanged or if the goods are not appropriated then the Brokerage shall be due on the 30th consecutive day after the last day for appropriation or advice of shipment.

5. QUALITY _____
Difference in quality shall not entitle Buyers to reject, except in accordance with an Award of Arbitration or an Award of a Board of Appeal.

6. DELIVERY—Each mark/parcel shall stand as a separate delivery and each delivery shall stand as a separate contract.

7. PERIOD OF DELIVERY—During _____ at Buyers' call. Buyers shall give at least _____ consecutive days' notice of probable readiness of vessel(s), and of the approximate quantity required to be loaded. Buyers shall keep Sellers informed of any changes in the date of probable readiness of vessel(s).

8. EXTENSION OF DELIVERY—The contract period of delivery shall, if desired by Buyers, be extended by an additional period of one calendar month, provided that Buyers give notice in accordance with the Notices Clause not later than the next business day following the last day of the delivery period. In this event Sellers shall carry the goods at Buyers' account and all charges for storage, interest, insurance and other such normal carrying expenses shall be for Buyers' account. Should Buyers not have taken delivery by the end of this extension period, Sellers shall have the option of declaring the Buyers to be in default or shall be entitled to demand payment at contract price plus such charges as stated above, less current f.o.b. charges, against warehouse warrants and such tender of warehouse receipts shall be considered complete performance of the contract on the part of the Sellers.

9. ICE CLAUSE—If delivery within the stipulated time be prevented by ice in the port of shipment, this contract or any unfulfilled portion thereof so prevented shall be _____

10. PAYMENT—By Nett Cash against Bill of Lading or Mate's receipt on presentation _____

11. CERTIFICATES OF ORIGIN—In the case of goods produced, grown or manufactured in the Commonwealth or in a country whose products are favoured with special terms of entry into the United Kingdom, Sellers shall ship in such manner as to preserve the entitlement of the goods to preference, and shall furnish at the time of entry a certificate of origin and/or necessary documents in the form valid at the time of shipment, otherwise they shall be responsible for any duty incurred through the non-production of such certificate and/or documents; the amount of such duty shall be paid to Buyers on demand against Customs receipt.
Should such certificate and/or documents be subsequently furnished by Sellers, Buyers shall at once reclaim the amount of the duty from the Customs and shall repay the money to Sellers when received.

12. DUTIES, TAXES, LEVIES, ETC.—All export duties, taxes, levies, etc., present or future, in country of origin, shall be for Sellers' account. All import duties, taxes, levies, etc., present or future, in country of destination, shall be for Buyers' account.

13. WEIGHTS—Bill of Lading weights to be final. Buyers or their representatives have the right to supervise weighing.

14. SAMPLING—If required by Buyers, at time and place of shipment by Buyers' and Sellers' representatives in accordance with the appropriate Rules for Sampling of the Grain and Feed Trade Association Limited.

15. ANALYSIS—If the goods are sold with a warranted analysis the first analysis shall be made by the Official Analysts to the Association. If the goods are shipped in bulk and the contractual quantity is represented by more than one sample the analyst shall mix the samples together in proportion to the weight represented by each sample. The method of analysis to be as prescribed in the Regulations made under the Agriculture Act for the time being in force _____

Official Analysts:
SALAMON & SEABER
13 Northumberland Alley,
London, EC3N 2EJ

16. LATENT DEFECT—The goods are not warranted free from defect, rendering same unmerchantable which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding.

17. INSURANCE—Marine and war risk insurance including strikes, riots, civil commotions and mine risks to be effected by Buyers with first class Underwriters and/or approved Companies. Buyers shall supply Sellers with confirmation thereof at least five consecutive days prior to expected readiness of vessel(s). If Buyers fail to provide such confirmation Sellers shall have the right to place such insurance at Buyers' risk and expense.

18. PROHIBITION—In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate preventing fulfilment, this contract, or any unfulfilled portion thereof so affected, shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, Sellers shall advise Buyers without delay with the reasons therefor. If required, Sellers must produce proof to justify their claim for cancellation.

19. FORCE MAJEURE, STRIKES, ETC. _____

20. NOTICES—Any Notices received after 1600 hours on a business day shall be deemed to have been received on the business day following. A Notice to the Broker or Agent shall be deemed a Notice under this contract. All Notices given under this contract shall be given by letter or by telegram or by telex or by other method of rapid written communication. In case of resales all Notices shall be passed on without delay by Buyers to their respective Sellers or vice versa.

21. NON-BUSINESS DAYS—Saturdays, Sundays and the officially recognised and/or legal holidays of the respective countries and any days which The Grain and Feed Trade Association Limited may declare as Non-Business Days for specific purposes shall be Non-Business Days. Should the time limit for doing any act or giving any notice expire on a Non-Business Day, the time so limited shall be extended until the first business day thereafter. This period of shipment shall not be affected by this clause.

22. DEFAULT—In default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice by letter, telegram, or telex, have the right to sell or purchase as the case may be, against the defaulter and the defaulter shall make good the loss, if any, on such purchase or sale on demand. If the party liable to pay be dissatisfied with the price of such sale or purchase or if the above right is not exercised and damages cannot be mutually agreed, any damages, payable by the party in default shall be settled by arbitration. In the event of default by Sellers entitling Buyers to damages, such damages shall be based upon the actual or estimated value of the goods on date of default, to be fixed by arbitration unless mutually agreed, and nothing contained in or implied under this contract shall entitle Buyers to recover any damages in respect of loss of profit upon any sub-contracts made by themselves or others unless the Arbitrators or Board of Appeal, having regard to any special circumstances, shall in their sole and absolute discretion award such damages. In the event of default in shipment or delivery, damages, if any, shall be computed upon the mean contract quantity.

23. CIRCLE—Where a Seller repurchases from his Buyer or from any subsequent Buyer the same goods or part thereof, a circle shall be established as regards the particular goods so re-purchased, and the provisions of the Default clause shall not apply. Subject to the terms of the Prohibition clause in the contract, if the goods are not delivered, or, having been delivered documents are not delivered, the invoices based on contract quantity shall be settled between each Buyer and each Seller in the circle by payment by each Buyer to his Seller of the excess of the Seller's invoice amount over the lowest invoice amount in the circle. Such settlement shall be made not later than 30 consecutive days after the last day for tendering. Should any party in the circle commit any act comprehended in the Insolvency clause, the invoice amount for the goods, calculated at the market price on the last day for tendering, shall be taken as the basis of settlement instead of the lowest invoice amount in the circle, such market price to be fixed if necessary by an arbitrator or arbitrators appointed by the Council of The Grain and Feed Trade Association Limited. As between the Buyers and Sellers in the circle, the non delivery of documents by each Seller to his Buyer shall not be considered a breach of contract.

24. INSOLVENCY—If before the fulfilment of this contract, either party shall suspend payments, commit an act of bankruptcy, notify any of his creditors that he is unable to meet debts or that he has suspended or that he is about to suspend payments of his debts, convene, call or hold a meeting of creditors, convene, call or hold a meeting to go into liquidation (other than for reconstruction or amalgamation) or shall apply for an Official moratorium, have a petition presented for winding up, or shall have a Receiver appointed, the contract shall forthwith be closed, either at the market price then current for similar goods, or at the option of the other party, at a price to be ascertained by re-purchase or re-sale, and the difference between the contract price and the closing price shall be the amount payable or receivable under this contract.

EXHIBIT M

23. DOMICILE—Buyers and Sellers agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment, or otherwise notwithstanding, and the Courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become. Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall for the purpose of proceedings at law, or in arbitration be considered as ordinarily resident or carrying on business at the offices of The Grain and Feed Trade Association Limited, and if in Scotland, he shall be held to have prorogated jurisdiction against himself to the English Courts; or if in Ireland to have submitted to the jurisdiction, and to be bound by the decision of the English Courts. The service of proceedings upon any such party by leaving the same at the office of The Grain and FeedTrade Association Limited together with the posting of a copy of such proceedings to his address abroad, or in Scotland or in Ireland, shall be deemed good service, any rule of law or equity to the contrary notwithstanding.

26. ARBITRATION—
(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules, No. 125, of the Grain and Feed Trade Association Limited, such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.
(b) Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrators, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.

27. ULIS CLAUSE—
The Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967, shall not apply to this contract.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI, S.p.A.,	:	
Plaintiff,	:	
- against -	:	76 Civ. 786 RJW
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff and defendant are two large international grain trading companies. This suit involves four separate transactions in connection with the purchase and sale of wheat, corn and soybeans. Plaintiff claims against defendant on two wheat and one corn transaction. Defendant counterclaims against plaintiff on the soybean transaction.

In this motion plaintiff seeks partial summary judgment only on its two causes of action arising under the wheat transactions. There is a triable issue as to whether the defendant is a proper party to the corn transaction;

accordingly plaintiff leaves its cause of action arising under the separate corn transaction for subsequent disposition by the court. It is anticipated that defendant will rely upon the other separate soybean transaction in opposing plaintiff's motion.

Statement of Facts

On November 26, 1974, plaintiff agreed to sell to defendant 20,320 metric tons of hard winter wheat at $175.00 per metric ton. Ex. D. Subsequently, on January 9, 1975, plaintiff agreed to purchase from defendant the same quantity and quality of wheat described in the original contract. Ex. E. On January 15, 1975, defendant issued its Credit Note 9113, agreeing to pay plaintiff $223,520 as a "washout" of the first two wheat contracts. Ex. G. Defendant has not paid plaintiff under Credit Note 9113.

On November 26, 1974, plaintiff entered into a third contract with defendant whereby plaintiff agreed to sell to defendant an additional 20,320 metric tons of hard winter wheat at $175.00 per metric ton. Ex. H. Subsequently, on January 19, 1976, defendant issued its Credit Note 9118, agreeing to pay plaintiff $225,866.90 as part of a "circle settlement" of defendant's obligations under the third con-

tract. Ex. I. Defendant has not paid plaintiff under Credit Note 9118.

Upon demand and non-payment of these two wheat claims, and the other corn claim (not involved in this motion), plaintiff brought suit herein and obtained an order of attachment against defendant's property in the amount of $839,386.96. Subsequently, the parties agreed upon security, and the attachment was vacated on consent. Defendant then filed its answer to the complaint, which included a counterclaim. Exs. A, B.

In the complaint plaintiff alleged the above described wheat transactions. Ex. A, ¶¶ 4, 5, 7 and 8. In its answer (Ex. B) defendant did not respond to those allegations and, under F.R.C.P. 8(d), they are deemed to be admitted.

Defendant also included a counterclaim in its answer. Ex. B, ¶¶ 5-11. Defendant's counterclaim airses under a fourth contract dated November 15, 1974 between plaintiff and Continental Grain Export Corp. for the purchase of soybeans. Ex. L. Defendant alleged that it received an assignment of the counterclaim from Continental Grain Export Corp. Ex. B, ¶ 8. Defendant also alleged that the counterclaim was subject to arbitration (Ex. B, ¶ 11) and in fact such arbitration is now pending in London.

I. PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE FIRST AND SECOND CAUSES OF ACTION STATED IN THE COMPLAINT.

Rule 56 provides in pertinent part that a plaintiff seeking to recover upon multiple claims may move for summary judgment in his favor upon "any part thereof".

There is no dispute whatever that since January defendant has owed plaintiff $449,386.96 under Credit Notes 9113 and 9118. Defendant's sole excuse for its failure to make payment is its counterclaim under the soybean contract which is now the subject of arbitration in London.

The first and third wheat contracts which are the genesis for the claims contained in this motion bear the same date and bind the defendant itself, not some other company. Exs. D, H. Moreover all three wheat contracts involve the same commodity and contain all but identical terms including an incorporation by reference of a clause requiring arbitration of disputes in New York. Exs. D, E, F, H. No disputes have ever arisen under those contracts; no demand for arbitration has ever been made. It is undisputed, indeed conceded by defendant on the face of the pleadings, that defendant owes plaintiff the money reflected in the credit notes.

By contrast, the fourth contract, which is the basis for the counterclaim was executed at a different time, involves a different commodity, and was entered into by plaintiff and a different company, Continental Grain Export Corp. Ex. L. Defendant asserts the counterclaim only by virtue of an alleged assignment, the existence of which is unverified, and which, if it exists, may well have been given without consideration and solely for purposes of this litigation. Furthermore, the soybean contract contains different terms which incorporate by reference a clause requiring arbitration of disputes in London. Exs. L, M. The parties to the soybean contract have joined issue in a substantial controversy over which, in March 1976, Continental Grain Export Corp. demanded arbitration, and the arbitration proceedings are now pending in London.

In short, plaintiff's claims under the wheat contracts are undisputed, liquidated and properly asserted in New York in litigation between the named parties to those similar contracts. Defendant's counterclaim based on an alleged assignment from a nonparty to this suit is hotly contested, unliquidated, and not even prosecuted here on the merits.

Under these circumstances, it is well settled that summary judgment should be granted on the undisputed, liquidated claims, notwithstanding the existence of a con-

tested, unliquidated counterclaim. Parker v. Wellborn, 261 F.2d 767 (D.C. Cir. 1958); Schroeter v. Ralph Wilson Plastics, Inc., 46 F.R.D. 323 (S.D.N.Y. 1969); 6 Moore's Federal Practice, ¶ 56.17[15] (2d ed. Moore & Wicker 1976).

As this court held in the Schroeter case, summary judgment is proper "on a claim involving no genuine controversy, notwithstanding the existence of other claims necessitating trial in excess of the amount of the claim for which summary judgment is granted". 49 F.R.D. at 326.

II. SUMMARY JUDGMENT SHOULD BE CERTIFIED AS FINAL, AS NO JUST REASON EXISTS FOR DELAY

F.R.C.P. Rule 54(b) provides in pertinent part that when multiple claims are presented in an action the court may direct the entry of a final judgment as to one or more of the claims "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment".

The claims and the counterclaim asserted in this action arise out of separate and distinct transactions. They are completely independent of each other, so that final judgment may conveniently be rendered on the wheat contracts

and that judgment certified as final under Rule 54(b). Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956); Parker v. Wellborn, 261 F.2d 767 (D.C. Cir. 1958).

Plaintiff's third claim, also for a liquidated sum and arising under the corn transaction, solely involves an issue of whether defendant is a proper party. That issue is not involved in the wheat transactions and no reason exists for holding up judgment on the wheat transactions until the time is ripe, after discovery and trial, for disposition of the corn transaction.

As for defendant's counterclaim, the merits of that unrelated controversy will be decided in London. Moreover, there is a substantial issue of whether defendant is a bona fide assignee for value of the counterclaim under the soybean contract or whether that assignment, if it exists, was improperly given solely to furnish defendant with some means of attempting to frustrate plaintiff's efforts to collect the sums concededly due under the wheat transactions.

Whatever may be the outcome of the arbitration in London under the soybean contract, that controversy will at no time be a subject for decision by this Court. What is more, in this situation, defendant would clearly not be permitted by the English courts to withhold payment of the liquidated sums concededly due under the wheat contracts

pending the outcome of the soybean arbitration. Cebora S.N.C. v. S.I.P. (Industrial Products), [1976] 1 Ll. L. Rep. 271 (C.A. 1975); Brown, Shipley & Co., Ltd. v. Alicia Hosiery, Ltd., [1966] 1 Ll. 1. Rep. 668 (C.A. 1966). In the Brown case, a defendant sought to avoid payment on a bill of exchange by setting up a counterclaim arising from a totally unrelated transaction. The Court of Appeals unanimously held, [1966] 1 Ll. L. Rep. at 669, that "when there is an action between the immediate parties to a bill of exchange, then in the ordinary way judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counterclaim which defendant may assert, even * * * a counterclaim relating to the specific subject-matter of the contract".

To be sure, here defendant did not issue a bill of exchange as such. Instead it issued credit notes. But there is absolutely no question that the sums stated on the credit notes have been due and owing since January, even before arbitration was commenced in London by Continental Grain Export Corp. under the soybean contract. The credit notes are nothing more than an express promise to make prompt payment of a liquidated debt and for purposes of this suit between the parties, they are the equivalent of bills of exchange.

There is, then, "no just reason for delay" in the entry of final judgment.

III. THE COURT SHOULD NOT STAY ENFORCEMENT OF THE FINAL JUDGMENT UNDER RULE 62(h)

Rule 62(h) provides in pertinent part that when final judgment is entered under Rule 54(b), the court "may stay enforcement of that judgment until the entering of a subsequent judgment * * * and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered".

Obviously defendant's motive in resisting payment under the wheat transactions is to exercise self-help to obtain security for payment of a possible award in its favor following the disposition of the unrelated soybean arbitration in London. Defendant has never made any showing of a need for such security.

As a practical matter, defendant is precisely in the same position as if it had obtained an order of attachment from this court in aid of the London arbitration. But it is perfectly clear that defendant would not have been entitled to such an order of attachment if one had been sought. McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032, 1038 (3 Cir. 1974); Metropolitan World Tankers Corp. v. P.N. Pertambangan

Minjakdangas Bumi National, S.D.N.Y., 75 Civ. 6123, December 22, 1975 (annexed hereto); cf. Tai Kien Indus. Co., Ltd. v. M/V HAMBURG, 528 F.2d 835 (9 Cir. 1976); Sanko S.S. Co., Ltd. v. Newfoundland Ref. Co., 411 F. Supp. 285 (S.D.N.Y.), aff'd without opinion, ___ F.2d ___ (2 Cir. 1976).

Italy, the United States, and, most recently, the United Kingdom (in December 1975) have all ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997 (republished as a note following 9 U.S.C. § 201).

The soybean arbitration, therefore, is subject to the Convention as well as 9 U.S.C. § 201 et seq. which Congress enacted to implement the Convention. In the McCreary case, the Third Circuit held that attachment in this country was unavailable in connection with a foreign arbitration subject to the Convention. In the Metropolitan World Tankers case Judge Motley similarly ruled.

Apart from the Convention, this Court in the Sanko case held, and the Second Circuit summarily affirmed, that a foreign forum clause in a commercial contract bars attachment as a remedy here. See also, Tai Kien Indus. Co., Ltd. v. M/V HAMBURG, 528 F.2d 835 (9 Cir. 1976).

Finally, in London, unlike our law, absent a compelling circumstance, security pending the outcome of

arbitration is generally unavailable even where a claimant might have a maritime lien (which, of course, is not present in this case, in any event). Compare The GOLDEN TRADER, [1975] Q.B. 348, [1974] 1 Ll. L. Rep. 378 (Q.B. 1974) with 9 U.S.C. § 8.

As previously indicated, defendant has never made any showing at all of a need for security pending the outcome of the unrelated soybean arbitration in London. If defendant were now to seek to make such a showing, it is submitted that this Court would be an inapproprite forum and defendant should be required to proceed before the courts at the arbitral situs in London.

In both law and simple justice, defendant would not be entitled to a stay of enforcement of a final judgment on the wheat transactions.

CONCLUSION

The motion for partial summary judgment should be granted and entered as a final judgment.

Dated: New York, New York
July 23, 1976

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff
25 Broadway
New York, N.Y. 10004
HAnover 2 - 7585

MICHAEL MARKS COHEN,
ROBERT J. ZAPF,
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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B. E. J. & H.

FLLI MORETTI CEREALI, S.p.A.,

Plaintiff,

- against -

CONTINENTAL GRAIN COMPANY,

Defendant.

---

76 Civ. 786 RJW

DEFENDANT'S RULE 9(g) STATEMENT OF ISSUES CONTROVERTED AND TRIABLE

1. Are the Credit Notes referred to in Paragraphs 5 and 8 of the Plaintiff's Statement of Facts bonds or promissory notes or merely evidence of credits?

2. Did the course of dealing between the parties evidence a running account to which debits and credits were to be applied?

3. Do the Credit Notes obligate the Defendant to credit the account of the Plaintiff in the amounts stated or to pay such amounts to the Plaintiff?

4. Defendant controverts the assertion made in Paragraphs 5 and 8 of Plaintiff's Statement of Facts that the Credit Notes obligate Defendant to pay the stated amounts.

Dated: New York, New York
August 2, 1976

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant

By J. Bond Smith
99 John Street
New York, New York 10038
732-4646

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B. E. J. & H.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CERRALI S.p.A.,	:	76 Civ. 786 RJW
Plaintiff,	:	
-against-	:	DEFENDANT'S AFFIDAVIT IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

P. EUGENE BRYANT, being duly sworn, deposes and says:

1. I am the Assistant Vice President, Processing Division, of the defendant herein. I make this affidavit in opposition to the plaintiff's Motion for Partial Summary Judgment based upon my personal knowledge of the facts and circumstances involved in this case or information and documents furnished to me by other officers or employees of the defendant.

2. I have read the affidavit of Remo Moretti sworn to July 8, 1976 and have examined the exhibits attached thereto.

3. The affidavit of Mr. Moretti correctly identifies the contracts between the parties which have led to this dispute. Moreover, defendant does not dispute the genuineness of the exhibits attached to Mr. Moretti's affidavit.

4. Mr. Moretti's affidavit does not, however, completely set forth the custom of the grain trade with respect to payment conditions.

5. It is undisputed that the parties are both large grain trading companies, which have been buying and selling each other large quantities of grain since 1970, at about which time the commercial relationship between the parties was established. During the years 1974 and 1975 the parties have either bought or sold to each other grain of an approximate value of $35,000,000.

6. It is customary in the grain business that running accounts are established between the major grain houses. This facilitates the administration of the voluminous number of contracts to which the parties are bound. The existence of a running account obviates the necessity of transferring funds whenever a contract is performed otherwise than by physical delivery of the goods.

7. To implement this custom, if a party performs its contractual obligation otherwise than by physical delivery it issues a credit or debit note to the other in which purchases and sales proceeds are adjusted, debited or credited against future transactions as may be agreed. Attached to Mr. Moretti's affidavit are Credit Notes (Exhibits G and I) by which defendant credited plaintiff's account with the sum of $449,386.96, which sum the defendant admits to be owing the plaintiff under several contracts for the purchase and sale of wheat identified as Exhibits D, E and H by Mr. Moretti.

8. On or about November 15, 1974, plaintiff and defendant's subsidiary, Continental Grain Export Corpora-

tion, entered into an agreement whereby the plaintiff agreed to buy 50,000 tons of soybean meal in bulk. That contract contemplated monthly shipments through August, 1976. A copy of said contract is attached to Mr. Moretti's affidavit as Exhibit L. However, on or about February 10, 1976 the plaintiff repudiated its obligation to perform that contract by a telex dated that day reading in part as follows:

> "...WE ARE COMPELLED ALTHOUGH RELUCTANTLY TO CONSIDER VOID AS OF THIS MOMENT EVERY AND ALL CONTRACTS STILL IN EXISTENCE WITH YOUR COMPANY ..."

9. Continental Grain Export Corporation is a wholly-owned subsidiary Domestic International Sales Corporation (DISC) of the defendant. To reduce its tax liability the defendant conducts all of its export sales through this DISC corporation. The relationship between the defendant and its DISC are more fully set forth in an agreement dated April 6, 1973, annexed hereto as Exhibit 1. In view of this relationship Continental Grain Export Corporation by an assignment executed as of March 2, 1976, assigned to the defendant all of its right, title and interest in and to the said soybean meal contract.

10. Shortly after the repudiation by the plaintiff of the soybean meal contract the defendant demanded arbitration under the provisions of the contract in which the parties agreed that all disputes would be decided in accordance with the Grain and Feed Trade Association Limited Rules in London, England. Defendant nominated its arbitrator on March 17, 1976 and seeks to recover damages from the plaintiff in that arbitration in an amount of $1,490,980, thus greatly in excess of the amount claimed by the plain-

tiff in this action. A copy of the debit note setting forth the claim by defendant's DISC against plaintiff is annexed hereto as Exhibit 2.

11. The wheat contracts upon which this action arises also contained arbitration clauses whereby the parties agreed that any disputes between them would be determined by the Rules of the North American Export Grain Association and contemplated arbitration of these disputes before the American Arbitration Association in New York. (Exhibit F to Mr. Moretti's affidavit) Defendant has not demanded arbitration under the wheat contracts because it believes the ultimate balance of the amount owing by either party to the other will be determined by the London arbitration.

12. The defendant is, pursuant to the custom in the grain trade, taking the position in London and before this Court that the Credit Notes were delivered by the defendant and accepted by the plaintiff with the mutual intention that they would be included in the customary running account.

13. Pending the decision of the arbitrators in London, defendant asserts its right of set-off.

F. Eugene Bryant

Sworn to before me this
2nd day of August, 1976

Notary Public

LUCY DILORENZO
Notary Public, State of New York
No. 24-4614923
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

AGREEMENT made April 6, 1973 between Continental Grain Company ("Parent") and Continental Grain Export Corporation ("DISC"), both of which are Delaware corporations and which maintain places of business at 2 Broadway, New York, New York 10004.

WHEREAS, Parent is engaged principally in the business of purchasing grain and other commodities within the United States and exporting such grain and other commodities to various customers throughout the world; and

WHEREAS, DISC has been organized by Parent as a wholly-owned domestic subsidiary (otherwise known as a "Domestic International Sales Corporation"), for the primary purpose of satisfying the provisions of Sections 991-997 and other related sections of the Internal Revenue Code of 1954 pertaining to Domestic International Sales Corporations; and

WHEREAS, Parent is desirous of granting an exclusive sales franchise to DISC with respect to Parent's export sales of all commodities (except for wheat and rice) which would be considered "Qualified Export Receipts" under Section 993(a) of the Internal Revenue Code of 1954.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto hereby agree as follows:

1. Appointment. Parent does hereby appoint, and DISC accepts such appointment as an exclusive sales franchisee, for all commodities (except for wheat and rice) in connection with export sales of the type described in Section 993(a) of the IRC of 1954

2. Sales. All applicable export sales of Parent which would be considered "Qualifying Export Receipts" under Section 993(a) of the IRC of 1954 shall pass through DISC thereby qualifying such sales for DISC preferred tax treatment. For this purpose, all sales of export property as defined in Section 993(c)(1) are to be included except such sales made under the PL 480, AID or the CCC barter program.

3. Profits. All of the net income produced from export sales transactions referred to in Section 2, to the maximum extent allowable under Sections 991-997, IRC of 1954 shall become the net income of DISC.

4. Selling Activities. Parent may solicit sales orders in the name of DISC using the latter's order forms. DISC may also directly place orders with Parent if it has received such orders.

5. Inventories. No inventories are required to be maintained by DISC.

6. Shipments. Parent may make direct shipments to customers of DISC.

7. Employees. Parent's employees may act on behalf of DISC in handling billings and collections, however, in the name of the latter company.

8. Bookkeeping. DISC shall have its own sets of separate books, records and bank account.

9. Commissions. DISC may alternatively act as a commission agent as well as a sales agent for Parent with respect to export sales transactions referred to in Section 1 above, and in such case, DISC shall earn commissions on such export sales to the maximum extent allowable under Sections 991-997, IRC of 1954.

10. Term. This Agreement shall commence on the date first above written and continue for one year and year to year thereafter until terminated at any time by the giving of thirty (30) days' prior written notice.

IN WITNESS THEREOF, the parties hereto have duly executed this Agreement on the day and year first above written.

CONTINENTAL GRAIN COMPANY

By _____
Executive Vice President

CONTINENTAL GRAIN EXPORT CORPORATION

By _____
President

277 PARK AVENUE
NEW YORK, N.Y. 10017

PAGE 1 OF 2 PAGES

DEBIT NOTE

Date: APRIL 22, 1976 Number: 4290

50414
TO: F. LLI MORETTI CEREALI S.P.A.
VIA DEGLI ALBERTI 72
50058 - SIGNA, FIRENZE, ITALY 11-IE

(1336)

We D E B I T your account as follows:	Amoun
RE: OUR CONTRACT NO. V-88723/ROME NO. 81-U 50,000 L/T U.S. SOYBEAN MEAL BASIS FOB VESSEL STOWED/TRIMMED ONE GULF PORT	
IN YOUR TELEX OF FEBRUARY 10, 1976, YOU REJECTED THE UNFULFILLED BALANCE OF THE ABOVE-MENTIONED CONTRACT, VIZ., THE FEBRUARY 1976 THROUGH AUGUST 1976 QUOTAS. WE, THEREFORE, DEBIT YOU WITH THE DIFFERENCE BETWEEN CONTRACT PRICE AND MARKET PRICE ON FEBRUARY 10, 1976 AS FOLLOWS:	
FEBRUARY 1976 QUOTA CONTRACT PRICE $200.00 PER M/T MARKET PRICE 155.50 PER M/T $ 44.50 PER M/T	
ON 5,000 L/T, EQUAL TO 5,080 M/T = $226,060.00	
MARCH 1976 QUOTA CONTRACT PRICE $200.00 PER M/T MARKET PRICE 157.50 PER M/T $ 42.50 PER M/T	
ON 5,000 L/T, EQUAL TO 5,080 M/T = 215,900.00	
APRIL 1976 QUOTA CONTRACT PRICE $200.00 PER M/T MARKET PRICE 157.50 PER M/T $ 42.50 PER M/T	
ON 5,000 L/T, EQUAL TO 5,080 M/T = 215,900.00	
MAY 1976 QUOTA CONTRACT PRICE $200.00 PER M/T MARKET PRICE 158.00 PER M/T $ 42.00 PER M/T	
ON 5,000 L/T, EQUAL TO 5,080 M/T = 213,360.00	
BROUGHT FORWARD TO PAGE 2 $871,220.00	

CONTINENTAL GRAIN EXPORT CORPORATION

MJ/cm

Exhibit 2

277 PARK AVENUE
NEW YORK, N.Y. 1001.

PAGE 2 OF 2 PAGES

DEBIT NOTE

Date:

Number: 4290

TO: F. LLI MORETTI CEREALI S.P.A.

We D E B I T your account as follows:			Amount
AMOUNT CARRIED FORWARD FROM PAGE 1		$871,220.00	
JUNE 1976 QUOTA			
CONTRACT PRICE	$200.00 PER M/T		
MARKET PRICE	158.00 PER M/T		
	$ 42.00 PER M/T		
ON 5,000 L/T, EQUAL TO 5,080 M/T =		213,360.00	
JULY 1976 QUOTA			
CONTRACT PRICE	$200.00 PER M/T		
MARKET PRICE	160.00 PER M/T		
	$ 40.00 PER M/T		
ON 5,000 L/T, EQUAL TO 5,080 M/T =		203,200.00	
AUGUST 1976 QUOTA			
CONTRACT PRICE	$200.00 PER M/T		
MARKET PRICE	160.00 PER M/T		
	$ 40.00 PER M/T		
ON 5,000 L/T, EQUAL TO 5,080 M/T =		203,200.00	
	TOTAL DUE US =		$1,490,980.00

PLEASE REMIT

CONTINENTAL GRAIN EXPORT CORPORATION

By

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLLI MORETTI CEREALI S.p.A.,

Plaintiff,

- against -

CONTINENTAL GRAIN COMPANY,

Defendant

- x

: 76 Civ. 786 RJW

: DEFENDANT'S AFFIDAVIT IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GERALD P. LEPP, being duly sworn, deposes and says:

1. I am the Associate Counsel and Assistant Secretary of the defendant herein. I make this affidavit in opposition to the plaintiff's Motion for Partial Summary Judgment based upon information and documents furnished to me by employees in London of the defendant.

2. On March 17, 1976 Continental Grain Export Corporation demanded arbitration of disputes arising with Flli Moretti Cereali S.p.A. under a soybean meal contract dated November 15, 1974 and appointed as its arbitrator S.J. Smith. As provided in the contract the arbitration is to be conducted in accordance with the rules of Grain and Feed Trade Association of London.

3. On March 23, 1976 the plaintiff nominated as its arbitrator A.J. Scott.

4. The two arbitrators met on at least two occasions to discuss substantive issues and facts and were

unable to agree upon an award. The extended period without reaching an agreement and before appointment of an umpire resulted from the frequent unavailability of Moretti's arbitrator and the delay in his receiving instructions.

5. In early July 1976 R. LaRiviere was appointed an umpire by the two arbitrators. Mr. LaRiviere has requested that the two arbitrators state their respective positions in writing, particularly with respect to the issue of repudiation. I am advised that Mr. Smith has prepared such a statement and that Mr. Scott has promised to deliver his statement the week of August 2, 1976.

6. The London arbitration is conducted on a documentary record without testimony of witnesses or representation by counsel. Continental Grain Export Corporation has submitted to the panel all documents upon which it relies. I know of no reason why the determination of the panel will not be made in the near future unless plaintiff chooses to delay the arbitration.

Gerald P. Lepp

Sworn to before me this
2nd day of August, 1976

Notary Public
LUCY DiLORENZO
Notary Public, State of New York
No. 24-4604923
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI S.p.A.,	:	
Plaintiff,	:	
-against-	:	76 Civ. 786 RJW
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant (hereinafter Continental) submits this memorandum in opposition to plaintiff's (hereinafter Moretti) Motion for Partial Summary Judgment.

STATEMENT OF FACTS

Moretti seeks partial summary judgment for $449,386.96 on the theory that the issuance by Continental of its Credit Notes in that amount makes the claim ripe for payment or judgment.

However, as shown by the affidavits of P. Eugene Bryant and Gerald P. Lepp, sworn to August 2, 1976, it is customary in the grain trade that debits and credits between buyers and sellers are effected by the delivery of credit

and debit notes; that these notes form elements of a running account between the parties which is a customary way of conducting the grain business; that notwithstanding Continental's delivery of Credit Notes to Moretti in the amount alleged, Moretti's account with Continental was debited in the amount of $1,490,000 as a consequence of Moretti's repudiation of a contract; that Continental is actively pursuing its arbitration in London to recover that amount from Moretti; and there is no reason to anticipate that the London arbitration award will not be made in the near future unless Moretti decides to delay the proceedings.

Moretti has been given security in this proceeding for an amount much in excess of the amount it now seeks to recover.

If Continental prevails in London there will, of course, be nothing owing to Moretti. In fact, Moretti will owe Continental over $1,000,000.

It is reasonable to assume that Moretti will urge as a defense in the London arbitration precisely the same allegations it now makes in its motion for judgment.

* * *

Continental submits Moretti's motion should be denied on any of the following grounds:

I.

THE PLEADINGS AND AFFIDAVITS FILED HEREIN SHOW ISSUES OF MATERIAL FACT EXIST WHICH PRECLUDE SUMMARY JUDGMENT

The theory of the complaint (Exhibit A to Mr. Moretti's affidavit) is because Continental has not paid the amount of the Credit Notes, summary judgment must be granted.

The answer (Exhibit B to Mr. Moretti's affidavit) admitted Continental's non-payment of the amounts of the Credit Notes. The Bryant affidavit shows, however, the custom in the grain trade is that credit and debit notes have effect only in the context of a running account.

There should be no substantial doubt on this point. The Credit Notes plainly state "We CREDIT your account ..." The notes are not currency or legal tender nor are they negotiable. They are only what they claim to be: "Credit Notes" against an "account."

Moretti cannot prove a case merely by toting up the Credit Notes, any more than a bank's customer can demand from the bank the total of his deposit slips. Both sides of the ledger must be considered. When this is done Mr. Bryant's affidavit shows a Debit Note for $1,490,980 was sent to Moretti.

The difference between the credits and the debit exceeds $1,000,000. Continental does not, at this time, say Moretti's account is overdrawn; Continental does, however,

take the view that it is entitled to do exactly what the Credit Notes say it may, i.e.,"credit" Moretti's account but need not make payment until the balance of the account is determined by arbitration in London.

At this juncture genuine issues of fact arise: what was the function of the Credit and Debit Notes? Were these documents to be the equivalent of a bond or promissory note (as Moretti apparently contends) or were they merely evidence of a credit, as appears from the face of the notes? What was the course of dealing between the parties with respect to a running account? Did Moretti repudiate the contract upon which the counterclaim arises?

None of these issues is treated, nor could they be, in the affidavits now before the Court. Yet they are issues which underlie the whole dispute between the parties. Their resolution is essential to a correct judicial determination on the merits.

Contintental accordingly submits these issues are ones of material fact, not susceptible of resolution on affidavits, and require a hearing. Therefore the motion for summary judgment must fail. This point would appear so basic as to make citation of authority unnecessary.

II.

IN THE ALTERNATIVE, MORETTI'S MOTION SHOULD BE STAYED PENDING DECISION BY ARBITRATION

Mr. Lepp's affidavit shows the London arbitration has been convened; both parties have appointed their arbitrators; the arbitrators have met and as a consequence of their failure to reach agreement have appointed an umpire to decide the issues; both sides will have delivered to the umpire their respective statements during the week of August 2 and there is no reason to believe the panel will not make its award in the near future unless Moretti seeks delay.

In those circumstances, and bearing in mind that the London arbitration will in all probability decide which party owes what amount to whom, only a portion of that question is now before this Court. It is submitted that Moretti's prosecution of its motion fosters circuity of actions and places an undeserved burden on this Court's calendar.

The position is quite similar to that in Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co., 339 F.2d 440 (2d Cir. 1964), where the Court of Appeals held the District Court had inherent power to stay a suit against a guarantor of a charter party pending the determination of the merits of the dispute between the owner and charterer by a panel of arbitrators in London.

Hays, C.J., wrote as follows:

"[pp. 441-442] The conditions under which such a stay may be granted were stated by Mr. Justice Cardozo:

> '[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. ... True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.' Landis v. North Am. Co., 299 U.S. 248, 254-255, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936)"

In a second application to the Court of Appeals in the same case (362 F.2d 205 (2nd Cir. 1965), the Court refused to modify further stays granted by the District Court. In a per curiam decision the Court held:

> "[p. 206] If a stay had been denied, many of the issues now pending in the London arbitration might have had to be litigated here. The district court properly wished to avoid 'futile activity.' There was no abuse of discretion in the decision to grant a stay."

Continental submits that the case at bar is the type of "futile activity" which the Court of Appeals refused to sanction in Isbrandtsen.

If Continental is wrong in this submission, it should be noted that the wheat contracts upon which Moretti premises its claim contain arbitration clauses (Moretti

affidavit Exhibits D, E, F and H) requiring disputes to be arbitrated before the American Arbitration Association (Exhibit F, Article 3).

If Moretti's activity is not "futile" Continental must assume it would not be any less futile if Continental were to apply to this Court for a stay of these proceedings under Section 3, Federal Arbitration Act (9 U.S.C. §3) which provides:

> "If any suit or proceedings be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Continental respectfully reserves its right to invoke this provision.

III.

PARTIAL SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHEN TO DO SO WOULD CAUSE PIECEMEAL DETERMINATION OF LIGITATION

In an effort to avoid the imposition of a stay, Moretti presents its case as a series of separate and distinct claims and seeks the remedy of F.R.C.P. Rule 54(b). The affidavit of Mr. Bryant, however, shows the claims and counterclaim are not separate but instead are inextricably

bound together because of the very nature of a running account and the concept of set-off.

Even if the claims and counterclaim are viewed as separate and independent, Rule 54(b) is not the proper remedy: the circumstances upon which the Rule was intended to operate are not present in this case and the application of the Rule would result in detriment to Continental.

Application of Rule 54(b) is discretionary. It is not to be applied in every claim/counterclaim case. The Rule is to be applied in the "infrequent harsh case" and not "routinely or as an accommodation to counsel." (Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3rd Cir. 1952); Panichella v. Pennsylvania Railroad Company, 252 F.2d 452, 455 (3rd Cir. 1958), cert. denied 361 U.S. 932 (1960); Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968); and Sears, Roebuck & Co. v. Mackey et al., 351 U.S. 427, 435 (1956))

In the instant case, application of Rule 54(b) will not expedite the overall disposition of the litigation. Moretti admits a trial is necessary in connection with its third cause of action. Thus Rule 54(b) will not:

> "... eliminate much unnecessary evidence, confine the issues, shorten the trial, save much expense to the litigant in connection with the preparation for trial and contribute to expediting the work of the court."
>
> (Combined Bronx Amusements v. Warner Bros. Pictures, Inc., 132 F.Supp. 921, 922 (S.D.N.Y. 1955)

In Gaetano Marzotto & Figli, S.p.A. v. G. A. Vedovi & Co., 28 F.R.D. 320, 325 (S.D.N.Y. 1961), the Court wrote, in declining to apply the rule:

> "[p. 325] ... [The defendant] should not be put to the burden of having a substantial judgment outstanding against it as of record in the absence of compelling circumstances not present in this record."

Moretti has shown no "compelling circumstances" in this case.

Continental submits another ground for refusing to apply Rule 54 (b) is the provision of Rule 62(h) providing:

> "Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

If the Court is, as Continental contends it should be, inclined to grant a stay pending the determination of the London arbitration, Rule 54(b) serves no useful purpose whatsoever.

Moretti's discussion of reasons for denying a stay under Rule 62(h) (Brief, pp. 9-11) is not clear. Moretti appears to argue that under the present state of the law, Continental would not be entitled to an attachment in this Court and this Court could require Continental to arbitrate its claim against Moretti in London.

But Continental made no attachment and is, of

course, actively pursuing its rights in London. It is Moretti, and not Continental, who has chosen the attachment remedy. If Moretti's statement of the applicable law is correct, it raises a doubt whether Moretti's attachment was proper. Perhaps this Court should vacate the attachment on Moretti's own theory of the case.

CONCLUSION

The motion for partial summary judgment should be denied because there are issues of material fact which cannot be decided by affidavits. In the alternative, the present action should be stayed until the arbitration in London has been decided. Rule 54(b) should not be applied in this case because the claim and counterclaim are not separate, distinct or independent of each other.

Dated: New York, N.Y.
August 2, 1976

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
99 John Street
New York, New York 10038
Tel.: (212) 732-4646

J. BOND SMITH, JR.
WILLIAM C. LEMMER

Of Counsel

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Bigham, Englar, Jones & Houston

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI, S.p.A.,

Plaintiff,

- against -

CONTINENTAL GRAIN COMPANY,

Defendant.

76 Civ. 786 RJW

REPLY AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

REPUBLIC OF ITALY)
PROVINCE OF FLORENCE :
CITY OF FLORENCE : ss.:
CONSULATE OF THE UNITED STATES OF AMERICA)

REMO MORETTI, being first duly sworn, deposes on his oath and says that:

1. I have read the affidavits of Messrs. Bryant and Lepp in opposition to plaintiff's motion for partial summary judgment.

2. As indicated in Exhibits F and M to my original affidavit, grain trading contracts require payment in cash against documents whenever such contracts are performed by physical delivery of the commodities by the seller to the buyer. Mr. Bryant does not - indeed he could not - dispute this universal practice.

3. Instead, to my amazement, he alleges in paragraph 6 of his affidavit a special custom which purportedly applies only when a grain trading contract "is performed other than by physical delivery of the goods." I understand him to

10-7-76

assert that such a custom exists only for grain trading transactions in which a contract is cancelled by a washout or circle settlement requiring one party to pay another a sum of money.

4. As Mr. Bryant acknowledges in paragraph 7 of his affidavit, the two wheat transactions which are the subjects of this motion, were a washout and a circle settlement obligating defendant to pay plaintiff $449,386.96, a sum which Mr. Bryant "admits to be owing the plaintiff."

5. However, defendant seeks to invoke the alleged special custom, and claims there exists a "running account" with Moretti which purportedly entitles it to defer payment of the sum concededly owed under the wheat transactions until a disputed claim by defendant's affiliate, Continental Grain Export Corp., under a separate soybean contract, is resolved by arbitration in London.

6. The existence of both such a custom and running account are conclusively refuted by the soybean contract on which defendant relies (Ex. L) which incorporates by reference Form No. 119 of the Grain and Feed Trade Association ("GAFTA"). Section 23 of Form No. 119 (Ex. M) expressly provides that for washouts and circle settlements "payment by each buyer to his seller of the excess of the seller's invoice amount * * * shall be made not later than 30 consecutive days after the last day for tendering."

7. On January 30, 1976, plaintiff received delivery and ultimately paid for nearly two million dollars worth of soybean meal under the soybean contract as evidenced by the invoice of Continental Grain Export Corp. annexed hereto as Exhibit N.

8. I do not know what method defendant uses for its own internal bookkeeping. But the wheat transactions are the very first washouts and circle settlements of any transactions between the parties. There is not, therefore, any prior course of dealing between the parties concerning such washouts and circle settlements. Moreover, defendant never told plaintiff at any time before the washout and circle settlement under the wheat contracts, and defendant does not even allege to have done so, that it proposed to establish a "running account" which would enable it to defer payment to plaintiff indefinitely.

9. Paragraph 12 of Mr. Bryant's affidavit is simply not an accurate description of the arbitration proceedings in London. To begin with, defendant is not a party to the London arbitration of the dispute under the soybean contract. Notwithstanding Mr. Bryant's assertion that Continental Grain Export Corp. had assigned the claim under the soybean contract to defendant, the arbitration in London is being pressed by Continental Grain Export Corp. itself for the full amount of its claim, as set forth in Exhibit 2 to Mr. Bryant's affidavit, and without any reference to a "running account." Indeed, the arbitrators recently handed down an award in favor of Continental Grain Export Corp. for approximately that amount as evidenced by Exhibit O annexed hereto.

10. Plaintiff will appeal this award to a GAFTA Board of Appeal under Rule 8 of the GAFTA Arbitration Rules, annexed hereto as Exhibit P, on the ground, among others, that the arbitrators improperly calculated damages on the basis of a constructive market price rather than by reference to actual sales by Continental Grain Export Corp.

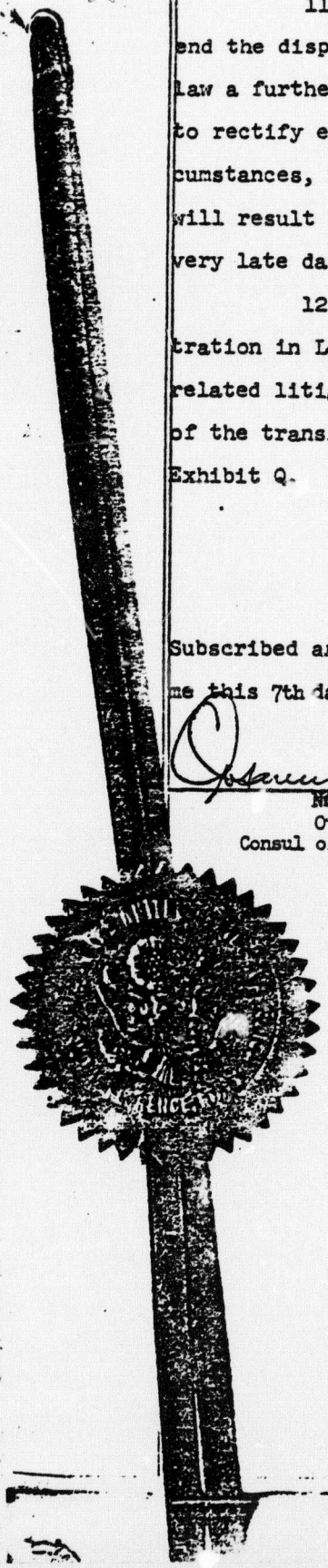
11. Even a decision by the Board of Appeal will not end the dispute since, I am advised by counsel, under English law a further appeal is allowed to the High Court of Justice to rectify errors of law by arbitrators. Under there circumstances, it is extremely unlikely that the London arbitration will result in a final award, after all appeals, until some very late date.

12. Finally, the conclusion of the soybean arbitration in London will not end the matter. There is also related litigation before the Rome Civil Court. A true copy of the translated complaint in that suit is annexed hereto as Exhibit Q.

REMO MORETTI

Subscribed and sworn to before
me this 7th day of October 1975

NOTARY PUBLIC
Ovsanna Karpootian
Consul of the United States
of America



INVOICE NUMBER: 56155 (10-22)

50414 IE-H
TO: F. LLI MORETTI DI ISIDORO
LASTRA A. SIGNA
FIRENZE, ITALY 8-BB

DATE (23-28): FEBRUARY 3, 1976

VESSEL : WORLD MARINE
FILE NO. : 1336
B/L DATE : JANUARY 30, 1976
CONTRACT (1-7) (10-11:AR) NO. OURS : V-88723
RECORD NO. (14-17)
CONTRACT NO. YRS/SRKS: ROME NO. 8-IU

FROM : PAULINA, LA. *
TO : ITALIAN PORT OR PORTS
FREIGHT : FOB
BASIS : FOB VESSEL PAULINA, LA. STOWED/TRIMMED
BILL OF LADING WEIGHT FINAL

QUANTITY	DESCRIPTION	AMOUNT (29-47)
	BUS. L/T 9,500 M/T (1016) 9,652	
21,280,000 LBS. (30-36) IN BULK	U.S. SOLVENT SOYBEAN MEAL, MIN. 44% PROTEIN/FAT, MAX. 7.5% FIBER, MAX. 12.5% MOISTURE,	
	@ $200.00 PER M/T	$1,930,400.00
	PLUS CARRYING CHARGES (DECEMBER 1975 SHIPMENT PERIOD)	
	STORAGE @ 15¢ PER M/T PER DAY	
	28 DAYS ON 487.472 M/T = $ 2,047.38	
	29 DAYS ON 4,338.528 M/T = 18,872.60	20,919.98
	INTEREST ON $1,930,400.00	
	7 DAYS @ 8-3/4% P.A. (JAN. 1/7) = $3,284.36	
	13 DAYS @ 8-1/2% P.A. (JAN. 8/20) = 5,925.26	
	9 DAYS @ 8-1/4% P.A. (JAN. 21/29) = 3,981.45	13,191.07
		$1,964,511.05 (72-80)

DOCUMENTS ATTACHED
B/L AND INSP. CERTF.

DAILY LOADINGS
1/28/76 - 1,074,740 LBS. = 487.472 M/T
1/29/76 - 10,365,580 LBS. = 4701.531 M/T
1/30/76 - 9,839,680 LBS. = 4462.997 M/T

(4750 L/T OR 4,826 M/T DECEMBER 1975 SHIPMENT PERIOD)
(4750 L/T OR 4,826 M/T JANUARY 1976 SHIPMENT PERIOD)

MJ/cm

"United States law prohibits disposition of these commodities to Southern Rhodesia, North Korea, North Vietnam, South Vietnam, Cambodia and Cuba, unless otherwise authorized by the United States."

EXHIBIT N

The Grain and Feed Trade Association Ltd.

FOUNDED 1971

Incorporating The Cattle Food Trade Association and The London Corn Trade Association

BALTIC EXCHANGE CHAMBERS
28 ST. MARY AXE
LONDON, EC3A 8EP

OFFICIAL FORM

We, the undersigned, having been appointed to Arbitrate in a dispute that has arisen between Continental Grain Export Corporation, New York (Sellers)
F.lli Moretti Di Isadoro, Florence (Buyers)
Compagnie Continentale Italiana, Rome & Renzo Riccardo Lenzi, Florence (Intervening as Brokers)

in respect of 35,000 long tons of 2240 lbs each for shipment 5,000 tons each month February, March, April, May, June, July and August, 1976 of U.S.A. Solvent Extracted Soyabean Meal, part of contract dated 15th November, 1974 No. V88723/81U

being unable to agree, hereby refer the dispute for decision by the appointed Umpire, R. La Riviere

S.J. Smith

A.G. Scott

I DO HEREBY AWARD that Buyers having repudiated the contract on the 10th February, 1976 and such repudiation having been accepted by Sellers as on the 8th March, 1976 Buyers committed a breach of contract, they are in default and they shall pay to Sellers within 14 days from the date of this Award the sum of U.S.$ 1.495.520 (one million four hundred and ninety three thousand five hundred and twenty United States Dollars) as damages being the difference between the contract price of U.S.$ 200.00 per metric ton and a settlement price of U.S.$ 158.00 (one hundred and fifty eight United States Dollars) per metric ton, plus Interest thereon at the rate of 10% (ten per cent) per annum from the 8th March, 1976 to the date of this Award.

R. La Riviere

And the Fees and Expenses of this Arbitration as under:—

	£	*VAT*
Non-use of official Contract ...	10.00	
Association's Fees	20.00	
Non-Member(s) Fee	10.00	
Expenses		
Arbitrators' Fees	450.00	
VAT		
TOTAL	£490.00	

G.A.F.T.A.
21 SEP 1976

(Dated)

VAT Registration No. 243 5997 21

are to be paid by Buyers £480.00 and by Sellers £10.00. In the event of an Appeal being lodged against this Award, Appeal fee for Members £125.00 and for Non-Members £150.00.

EXHIBIT O 1

Effective 1st October, 1973

THE GRAIN AND FEED TRADE ASSOCIATION
LIMITED

No. 125

Copyright

ARBITRATION RULES

PRELIMINARY

1.—(a) Any dispute arising out of a contract embodying these Rules (including any question of law arising in connection therewith) shall be referred to arbitration in London. Each party shall appoint an arbitrator and such arbitrators shall have the power, if and when they disagree, to appoint an umpire whose decision is to be final (subject only to appeal as hereinafter provided).

(b) An arbitrator or an umpire appointed under these Rules shall either be a Member of the Association, or with the consent of his principals, an employee of a Member, but in either case he shall be a person engaged or who has been engaged in the trade and shall not be interested in the transaction nor directly interested as a member of a firm or a company named as a party to the arbitration.

(c) An appointment shall be valid if the arbitrator has indicated his acceptance of the appointment and the claim has been despatched to the other party within the time limits laid down in these Rules.

APPOINTMENT OF ARBITRATORS/UMPIRES

2.—(a) Each party may appoint an arbitrator as provided in Rule 1.

(b) Any party requiring an arbitrator to be appointed on his behalf may apply to the Association within the time limits stipulated in Rule 3. Any two of the Officers may, in their discretion, appoint an arbitrator to act for the party applying, provided that such application is addressed in writing to the Secretary and provided that a copy has been despatched to the other party within the time limit laid down in Rule 3. Such appointment shall for the purposes of any time limit provided by these Rules be equivalent to the appointment of an arbitrator by the applicant.

(c) If one party has appointed his arbitrator, despatched notice in writing of the appointment to the other party and called upon that party to appoint his arbitrator, and the party fails to comply within nine consecutive days of the notice being served (such notice to be despatched in accordance with Rule 3) then, either party may apply to the Association for the appointment of an arbitrator, to act on behalf of the party who has failed to appoint. Provided that the application is accompanied by evidence that (i) the parties had, prima facie, entered into a contract subject to these Rules, (ii) notice was despatched to the other party that arbitration was claimed and (iii) notice was despatched that application was being made to the Association for the appointment of an arbitrator, and the appropriate fee ruling at the date of application has been paid, any two of the Officers shall appoint an arbitrator to act on behalf of the party who failed to appoint an arbitrator to act on his behalf.

(d) Any party making an application to the Association for the appointment of an arbitrator in accordance with Rule 2 (c) may be required by the Association to pay a deposit of such sum as the Association may require on account of any fees and expenses thereafter arising if the arbitrators or an umpire should decide that under the provisions of Rule 4 they have no jurisdiction.

(e) If an arbitrator dies or refuses to act or becomes incapable of acting or fails to proceed with the arbitration and a substitute is not appointed by the party for whom he was acting within five consecutive days after notice of such death, refusal, incapacity, or failure as the case may be, any two of the Officers shall have the power to appoint an arbitrator, provided that application is made in accordance with the second sentence of Rule 2(c).

(f) If the arbitrators appointed fail to agree on the appointment of an umpire, any two of the Officers shall at the request of either arbitrator have the power to appoint an umpire, on payment of the appropriate fee ruling at the date of application.

All persons appointed under the provisions of this Rule shall be qualified to act as defined in Rule 1.

PROCEDURE FOR CLAIMING ARBITRATION AND TIME LIMITS

3.—(a) **General**
Notice of the intention to proceed to arbitration shall be despatched and an arbitrator appointed in writing by the party claiming arbitration as stated below, which notice shall be valid if passed on by the intermediate parties without undue delay.

(b) **Technical**
(i) Within 90 consecutive days of the expiry of the contract time of shipment or of the date of completion of final discharge of the ship at port of destination, whichever period shall last expire.
(ii) In respect of final invoices within 24 consecutive days of the dispute having arisen.

(c) **Grain, Pulses and Cereal Products**
Contracts numbers: 2, 3, 5, 7, 11, 11a, 12, 13, 14, 14a, 16, 19, 26, 27, 28, 30, 31, 32, 35, 36, 41, 43, 48, 49, 50, 51, 53, 54a, 59, 60, 61, 62, 64, 74, 74a, 75, 77, 79, 79a, 80, 83, 84, 85.
Quality
(i) When the sale has been a sale by sample, within 14 consecutive days of the date of completion of final discharge of ship at port of destination.
(ii) When the sale has been of fair average quality to be assessed upon the basis of and by comparison with the Association's official F.A.Q. Standard of the month during which the Bill of Lading is dated, within 14 consecutive days of the publication in the Trade Lists that the Standard has been, or will not be, made.
(iii) When the sale has been of fair average quality against a Standard which is officially adopted by the Association, within 14 consecutive days of the completion of final discharge of the ship at port of destination or within 14 consecutive days of the publication in the Trade Lists that the Standard has been, or will not be, adopted, whichever period shall last expire.

(d) **Condition**
Where the goods have been bought and sold on terms known as "Rye Terms", within 10 consecutive days of the date of completion of final discharge of the ship at port of destination.

(e) **Protein Feeding Stuffs**
Contracts numbers: 1, 4, 6, 8, 9, 10, 15, 17, 22, 100, 101, 102, 103, 104, 105, 106, 107, 108, 116, 119.
Quality and/or Condition
(i) In respect of quality and/or condition, not later than 24 consecutive days after final discharge of the vessel declared against the contract. (Except for Rye Terms in which case the time shall be 10 consecutive days.)
(ii) In respect of the quality and/or condition of goods sold otherwise than for shipment, within 28 consecutive days after the date of delivery.

EXHIBIT P-12

(f) Finality

Every arbitration claimed in accordance with these rules must be proceeded with, if for—

Quality. (i) When the sale has been a sale by sample, within 28 consecutive days of the date of completion of final discharge of the ship at port of destination.

(ii) When the sale has been of fair average quality, in respect of *Grains, Pulses and Cereal Products* (Contracts listed clause No. 3 (c)) within 28 consecutive days of the publication in the Trade Lists that the Standard has been, or will not be, adopted or made, or within 28 consecutive days of the completion of final discharge of ship at port of destination which ever period shall last expire.

(iii) When the sale has been of fair average quality, in respect of *Protein Feeding Stuffs* (Contracts listed clause No. 3 (e)) within 60 consecutive days of the date of appointment of an arbitrator by or on behalf of the party against whom arbitration has been claimed.

Condition. (iv) Unless the goods have been bought or sold on terms known as "Rye Terms", within 21 consecutive days of the date of completion of final discharge of the ship at port of destination.

In the event of non-compliance with any of the preceding provisions of this Rule, claims shall be deemed to be waived and absolutely barred, unless the Arbitrators, Umpire or Board of Appeal referred to in these Rules, shall, in their absolute discretion, otherwise determine.

PROCEDURE FOR ARBITRATIONS

4.—In the event of a contract forming part of a string of contracts which are in all material points identical in terms, except as to price, any arbitration for quality and or condition shall be held as between the first seller and the last buyer in the string as though they were contracting parties, provided that every party against whom arbitration is claimed and who claims to be in a string shall have supplied his contract and all relevant information to the arbitrators, and any award so made (hereinafter referred to as a string award) shall, subject to the right of appeal, except an award in respect of condition where the goods have been bought and sold on terms known as "Rye Terms", be binding on all intermediate parties in the string, and may be enforced by any intermediate party against his immediate contracting party as though a separate award had been made under each contract.

5.—(a) An arbitrator or an umpire appointed in accordance with the provisions of Rule 2(c) of these Rules may decide in his absolute discretion at any time after the appointment and prior to making an award, that, having regard to the nature of the dispute between any of the parties, such dispute is not one arising out of a contract embodying these Rules, and that in consequence he has no jurisdiction under these Rules to arbitrate thereon.

(b) In the event of an arbitrator or an umpire deciding that he has no jurisdiction as in Rule 5(a) aforesaid he shall forthwith certify in writing to this effect and forthwith notify the parties to the dispute and the Association in writing of his decision and thereupon the dispute shall be deemed to be one which is not subject to the Arbitration Rules of the Association and accordingly such Rules shall not apply thereto.

(c) The decision of an arbitrator or umpire appointed in accordance with the provisions of Rule 2(c) of these Rules and made pursuant to Rule 5(a), thereof shall be final and binding upon the parties and upon the Association and it shall not be subject to any right of appeal to the Committee of Appeal save when made by consent of all the parties who shall notify the Association in writing not later than 28 consecutive days after the date of the said decision of their intention to appeal against such decision (hereinafter referred to as the preliminary issue).

(d) Upon being notified as aforesaid the appropriate Committee of Appeal shall elect a Board of Appeal to determine the preliminary issue.

(e) The Board of Appeal may in its absolute discretion lay down the procedure to be adopted at the determination of the preliminary issue and may order the parties to the dispute to lodge with the Association within a specified time such fees as the Board of Appeal considers reasonable as a condition of the determination of the preliminary issue.

(f) The Board of Appeal shall either uphold or reverse the decision of the arbitrator or umpire on the preliminary issue.

(g) In the event of the Board of Appeal upholding the arbitrator or umpire on a preliminary issue, the Board of Appeal shall certify accordingly and shall notify all parties, the arbitrators, the umpire and the Association that the dispute is deemed to be one which is not subject to these Rules and accordingly that such Rules shall not apply thereto.

(h) In the event of the Board of Appeal reversing the decision of the arbitrator or umpire on a preliminary issue, the Board of Appeal shall certify accordingly and shall notify all parties, the arbitrators, the umpire and the Association and shall order that the dispute be remitted to arbitration afresh whereupon:—

(i) the dispute shall be deemed to be one arising out of a contract embodying these Rules.

(ii) the arbitrators and umpire who were formerly appointed shall thereupon cease to act.

(iii) the Board of Appeal may in its absolute discretion extend the time under Rule 5(e).

Provided that:—

(iv) no arbitrator or umpire previously appointed under the provisions of Rule 2(c) of these Rules to determine such dispute shall be re-appointed when the dispute is remitted as aforesaid.

(v) no objection shall be taken under Rule 3 that time has expired if the requirements of Rule 3 were previously validly complied with.

(vi) the Board of Appeal may in its absolute discretion extend the time under Rule 3.

(i) The Board of Appeal shall have absolute discretion to make such order by way of costs in respect of the preliminary issue as it deems just and equitable.

(j) The decision of the Board of Appeal on the preliminary issue shall be conclusive and binding upon the parties and upon any subsequent Board of Appeal to which the arbitration award may be referred under these Rules.

(k) The determination of the preliminary issue shall not preclude a subsequent appeal under these Rules as hereinafter provided, save that no Member of the Board of Appeal which determined the preliminary issue shall be eligible to vote for or serve on a Board of Appeal which subsequently determines the appeal against the award of arbitration in that dispute.

AWARDS OF ARBITRATION

6.—(a) All awards of arbitration by arbitrators or an umpire shall be in writing on an official form issued by the Secretary, and the arbitrators or umpire shall have the power to award the costs of and connected with the reference, and may assess their fees. The Association's fees shall be those for the time being in force as prescribed by the Council.

(b) The arbitrators or umpire, on the application of either party before the arbitration award is signed, shall have the power to extend the time for appealing in any case in which they or he consider it just or necessary so to do. Any such extension must be stated in the award of arbitration.

(c) Upon the signing of an award of arbitration it shall be the duty of the arbitrators or the umpire to lodge it with not less than two official copies with the Secretary. The Secretary shall date the award and the copies and shall either (i) issue the award to the party who claimed arbitration, who shall within a specified number of days pay the fees and expenses, and send copies to the other parties, or (ii) give notice to the parties named in the award that the award is at their disposal upon payment of the fees and expenses to the Association.

(d) If an award is not paid for in accordance with either Rule 6(c)(i) or Rule 6(c)(ii) within twenty-one consecutive days after the date of the award, the Secretary may call upon any of the principals named to take up the award, and in such case the party so called upon shall pay the fees and expenses as directed.

(e) Awards of arbitration (subject to the right of appeal hereinafter mentioned) shall be conclusive and binding on the parties, both with respect to the matter in dispute and all expenses of and incidental to the reference and award.

APPEALS

7.—No appeal shall be allowed on awards for condition where the goods have been sold on terms "Guaranteed sound on arrival and/or Rye Terms."

8.—(a) If any party, except as provided in Rule 7 above, be dissatisfied with an arbitration award, a right of appeal shall lie to a Board of Appeal to be elected in accordance with the Rules and Regulations of the Association in force at the time of the contract and provided that the following conditions are complied with, but not otherwise:—

(i) The appellant shall give written notice of appeal to the Secretary accompanied by a copy of the notice which is required by Rule 8(a)(iii) to be sent by him to the other party to the arbitration award and (subject to the provisions of Rule 10) payment to the Association of a fee of £75 if the appellant is a Member of the Association or a fee of £100 if he is a Non-Member.

(ii) The appellant's notice of appeal (except in the event stated in Rule 10) and the remittance in respect of the fee shall reach the Secretary not later than 12 noon on the 30th consecutive day after the date of the arbitration award. (The Notices Clause in the contract shall not apply.)

(iii) The appellant, when giving notice of appeal, shall also despatch written notice thereof to the other party.

(iv) The appellant shall proceed with his appeal with due despatch.

(v) The total fees and expenses of the arbitration award shall be paid before the appeal is heard.

(vi) In cases of appeals lodged by more than one party in relation to the same award any two of the Officers shall have the power to consolidate such appeals for hearing by the same Board of Appeal.

(b) The appellant shall pay such further sum or sums on account of fees, costs and expenses as may be called for by the Association prior to the publication of the award by the Board of Appeal.

(c) If the appellant on receiving notice from the Secretary of the date fixed for the hearing of the appeal, requests a postponement of more than 14 consecutive days or at the first or any subsequent hearing of the appeal requests an adjournment, or if either party requests a Special Case to be stated for the opinion of the Court, then in any such event the Board of Appeal may in its absolute discretion direct that any money required by the terms of the arbitration award to be paid by either party to the other shall be paid either in whole or in part to the Association. Such money shall be placed on deposit with a bank in the name of the Association pending the publication of the award of the Board of Appeal and on the publication of the award the said money (with the deposit interest, if any, less tax) shall be applied by the Association in such manner as to give effect to such award either in whole or in part according to the interests of the parties and the principal sum available. Provided that, if in the opinion of the Board of Appeal after hearing the parties, the appellant shall be guilty of undue delay in proceeding with his appeal, he shall, after due warning and if the Board of Appeal so decides, be deemed to have withdrawn his appeal (with the consequences as stated in Rule 16) in which event the money on deposit (with interest, if any, less tax) shall immediately become due and payable to the party and/or parties entitled thereto under the terms of the Award of Arbitration.

(i) If the appellant fails to make such payment as aforesaid in accordance with the directions of the Board of Appeal and within such time as the Board of Appeal stipulates, subject to the provisions of Rule 10, the Appeal shall be deemed to be withdrawn.

(ii) If a party requesting a Special Case fails to make such payment as aforesaid in accordance with the directions of the Board of Appeal and within such time as the Board of Appeal stipulates, subject to the provisions of Rule 10, the request for a Special Case shall be deemed to be withdrawn.

9.—The party requiring a Special Case to be stated for the opinion of the Court shall within 9 consecutive days from the requirement, pay to the Association by way of a deposit and on account of the costs, fees and expenses of or connected with the stating and argument thereof the sum of £500 or such larger sum as the Board of Appeal may require and shall, on demand, pay to the Association such further sum or sums, if any, as the Board of Appeal may from time to time require for or on account of such costs, fees and expenses.

10.—If an appellant or a party requiring a Special Case to be stated for the opinion of the Court is precluded by currency regulations from paying immediately any money due to be paid by him under this Rule and notifies the Secretary in writing (i) in the case of the appeal fee when giving notice of appeal and (ii) in the case of any further sum being called for under Rule 8(b) or being directed to be paid under Rule 8(c), within 9 consecutive days of the money being demanded, accompanied (in every case) by evidence from a bank that he has already made application for the transfer of the required sum, he shall be granted an extension of up to 35 consecutive days from the date when the said payment becomes due in which to pay such sum.

11.—(a) In any case in which a string award shall have been made by any arbitrators or umpire as aforesaid and the first seller, the last buyer, or any intermediate party bound thereby shall be dissatisfied therewith (whether the award shall be in his favour or against him) the first seller, the last buyer, or any intermediate party (as the case may be) or any of them shall be entitled to appeal against that award to the said Board of Appeal, provided that each of the following provisions in addition to the provisions of Rule 8 shall first have been complied with.

(i) The appellant shall give notice of appeal to the Secretary accompanied by a copy of the notice which is required by sub-paragraph (iv) to be sent by him to the other party to the arbitration award and, subject to the provisions of Rule 10, payment to the Association of the appropriate fee.

(ii) If the appellant is an intermediate party he shall state in such notice of appeal whether he is appealing as buyer or seller.

(iii) The appellant's notice of appeal (except in the event stated in Rule 10) and the remittance in respect of the fee shall reach the Secretary not later than 12 noon on the 30th consecutive day after the date of the arbitration award.

(iv) If the appellant is a first seller or last buyer he shall, when giving notice of appeal, also despatch written notice thereof to the intermediate party in immediate contractual relationship with him and if the appellant is an intermediate party and is appealing as buyer or seller, he shall when giving notice of appeal also despatch written notice thereof to his own immediate seller or buyer, as the case may be.

(b) Every notice given to an intermediate party by a first seller, a last buyer or by another intermediate party in accordance with the provisions of sub-paragraph (a) hereof shall be passed on in due course and such passing on shall, as between the intermediate party passing the same on and the party to whom the same is passed on, be deemed to be compliance with the said conditions relating to appeals, anything hereinbefore contained to the contrary notwithstanding.

(c) All appeals to which this Rule applies shall be held in the like manner in which the corresponding arbitrations are required by Rule 4 to be held and any award made by a Board of Appeal shall in all respects have the like effect and shall be enforceable in the like manner as is provided in that Rule in the case of awards made in the corresponding arbitration, and non-compliance with any of the provisions of sub-paragraph (b) of this Rule shall in no way limit or affect the rights and jurisdiction of the Board of Appeal.

12.—Each party to an appeal from an arbitration award shall state its case either orally or in writing and may either appear personally or be represented by an agent engaged or who has been engaged in the trade and duly appointed in writing, but shall not be represented at the hearing of such appeal by a lawyer including counsel or solicitor, wholly or principally engaged in private practice, unless special leave shall previously have been obtained in writing from the Board of Appeal, which leave the Board of Appeal may grant or refuse in their absolute discretion and without assigning any reason.

13.—An appeal involves a rehearing and the Board of Appeal may confirm, vary or reverse the award of the arbitrators or of the umpire. The award may not however be varied or reversed unless all or all but one of the Members of the Board are in favour of so doing. The Board of Appeal may award the payment of the costs and expenses of and incidental to the arbitration and appeal, but such fees shall follow the award, unless all or all except one of the members of the Board of Appeal shall direct otherwise. The award of the Board of Appeal, whether confirming or varying the original arbitration award, shall be signed by the Chairman of the Board of Appeal, and when so signed shall be deemed to be the award of the Board of Appeal and shall be final and conclusive in all cases.

14.—In the case of the illness or death, or refusal, incapacity or inability to act, of any Member elected to serve on a Board of Appeal, the remaining Members of the Board may, in the absence of a duly elected substitute and provided that the number of Members is not reduced below four, act and exercise all the powers of a Board of Appeal. If it be reduced to three the parties or their representatives shall decide whether the Board be re-constituted.

15.—The Board of Appeal shall have the power to vary an arbitration award (in addition to the power to vary in any other manner) by increasing, if the Board shall see fit, the liability of the appellant.

16.—An appellant from an arbitration award shall have the right, at any time before the hearing of the appeal is begun, to withdraw his appeal. On notice being received from the appellant within 10 consecutive days of the date on which the appeal is accepted half of the fee shall be returned and on notice not later than 48 hours before the time fixed for the hearing a quarter of

the fee shall be returned, but on any later withdrawal no part of the fee shall be returned. In the event of an appellant withdrawing his appeal as aforesaid, the Board of Appeal shall have the power to award such sum by way of costs as they in their absolute discretion deem to be proper in the circumstances.

17.—Where appeals from an arbitration award are lodged by both parties and the Board of Appeal directs that the fees shall be divided, £20 shall be returned to each party, and when the fees are not so divided, £40 out of the fee lodged shall be returned to the successful appellant.

18. The Secretary may call upon either of the disputing parties to take up the award of the Board of Appeal, and in such case the party so called upon shall take up the award and pay the fees, costs and expenses.

19. Any dispute as to whether any of the conditions referred to in Rules 8 and 11 have been complied with shall be heard and determined by the Board of Appeal. If the Board of Appeal shall determine that any of those conditions have not been complied with, it may in its absolute discretion extend the time for compliance (notwithstanding that the time may already have expired) or dispense with the necessity for compliance and may proceed to hear and determine the appeal as if each and all of those conditions had been complied with. The determination of the Board of Appeal of any matter to which this paragraph applies shall be final, conclusive and binding.

GENERAL PROVISIONS

20.—All samples sent to the Association for arbitration, testing and/or other purposes shall become and be the absolute property of the Association.

21.—(*a*) No award by arbitrators or an umpire shall be questioned or invalidated on the ground that either of the arbitrators or umpire is or was not qualified to act as provided in Rule 1, unless objection to his acting is made in writing before the hearing of such arbitration is begun.

(*b*) No award of a Board of Appeal or decision by a Board of Appeal on a preliminary issue as defined in Rule 5(*k*), shall be questioned or invalidated on the ground of any irregularity in the election of the Board of Appeal or of any of its members, or on the ground that any member of the Board of Appeal was not eligible to serve, unless objection is made in writing and established to the satisfaction of the Board of Appeal before the hearing of the Appeal or of the preliminary issue is begun.

22.—Whenever it shall appear to the Council that by reason of a state of war, war-like operation, strike, lock-out, riot or civil commotion existing, or which may hereafter exist, parties to contracts which have been, or may hereafter be made, upon any of the contract forms of the Association, have been, or may be prevented from exercising any of their rights within the time limits prescribed by these Rules, the Council shall have, and shall be deemed always to have had, the power to extend any of such time limits at any time and from time to time and to any extent necessary to enable justice to be done between the parties. Such extension may be made generally or with reference to any particular dispute.

In the event of the Council deciding so to extend any of such time limits with reference to any particular dispute, notice thereof shall be given by the Council to any of the parties to the contract who may be available to receive it.

23.—The Provisions of the Arbitration Act, 1950, or of any statutory modification or re-enactment thereof for the time being in force, shall apply to every arbitration and appeal as aforesaid, save in so far as the same are modified by or are inconsistent with any of the foregoing provisions of these rules.

DEFAULTERS

24.—In the event of any party to an arbitration/appeal held under these Rules neglecting or refusing to carry out or abide by a Final Award of arbitrators or umpire or Board of Appeal made under these Rules, the Council of the Association may post on the Association's Notice Board and/or circularise to Members in any way thought fit notification to that effect. The parties to any such arbitration/appeal shall be deemed to have consented to the Council taking such action as aforesaid.

SUMMARY OF FEES

Official Appointment of an Arbitrator	Members	£5	per contract
	Non-members	£10	
Official Appointment of an Umpire		£5	
Arbitration Awards (In addition to fees charged by arbitrators).			
Association's basic fee (Technical & Quality)		£20	
Fee, when the official form of contract has not been used		£10	
Fee to be paid by each Non-member named as a principal in the award		£5	
Appeals			
Per Arbitration Award	Member	£75	
	Non-Member	£100	

All Communications to be addressed to
The Secretary, The Grain and Feed Trade Association, 23 St. Mary Axe, London, EC3A 8EP.

CIVIL COURT OF ROME

WRIT OF SUMMONS

The undersigned S.P.A. F.LLI MORETTI CEREALI with head orfice in Signa(Florence)in the person of their legal representative the Sole Administrator Mr. Remo Moretti, for the purpose of the present document electively domiciled in Rome in and at the studio of solicitor Enrico Buglielli, Lungotevere Tor di Nona, 3, who represents and defends same as per power of attorney in the margin, together with solicitor Mario Ardito,

whereas

the undersigned stipulated, on the 15th November 1974, with the Continental Grain Export Corp. of New York, through the consociate of the latter mentioned firm, Compagnia Continentale Italiana of Rome and the broker, Renzo and Riccardo Lenzi of Florence, a sales contract for 50,000 long tons of soya meal, USA, at the price of U.S. Dollars 200 per metric ton, to be loaded in the months of November and December 1975, and January/February/March/April/May/June/July and August of 1976 in quotas of 5000 long tons each on FOB conditions in a Gulf port, and payment against documents in New York;

EXHIBIT Q-3

that in the month of September 1975, as said contract have apparently become a burden following a notable abatement of soya meal on the international market, The Compagnia Continentale Italiana, in the person of Mr. Renato Papo, began asking, with some insistance, Mr. Remo Moretti, Sole Administrator of the undersigned society, what were his intentions regarding the fulfillment of the afore-mentioned contract for soya meal, the loading of which should have begun in November 1975 to finish in August 1976, as the price had become burdensome; that the afore-mentioned Mr. Remo Moretti replied that he obviously intended to fulfill said contract, pointing out that he was creditor, of relevant sums, of the Society formi[illegible] part of the group to which the Compagnia Continentale Italiana belongs, for which reason there were no motives to have any doubts about the afore-said fulfillment; that one one of the afore-mentioned occasions, in the preference of Mr. Riccardo Lenzi, broker of said contract, the afore-mentioned Mr. Papo said, textually, to Mr. Moretti:

"I hope that Mr. Moretti isn't thinking that I "could advise mine(my clients) in New York to "close the cargos of grain where you have a margin

"of interests which mature beforehand and therefore
"have you cash in the difference deriving from same,
"thus leaving open the contract for soya meal where
"you have a net loss - you can get that idea out of
"your head, as if you didn't withdraw(accept) the
"soya I'd be risking my job, which I absolutely
"will not do.";

that after this speech, which placed in doubt the willingness of the undersigned society to fulfill, threatening the latter society not to pay the credits which had matured on other commercial operations and contracts, the Compagnia Continentale Italiana, through its representatives and middlemen, made it known also to the other Sellers of cereals on the Italian market, during the periodic meetings of same, that the undersigned Society was finding itself in grave difficulties due to a contract of 50,000 long tons of soya meal stipulated at a price which had at that moment become burdensome due to the conditions of the market;

that on the 26th October 1975 during a visit by Mr. Giovanni Niccolai of the firm Alimenti Zootecnici Niccolai SPA of Castellina in Chianti(Siena) to the offices of the Compagnia Continentale Italiana in Rome, he was told by Messrs Galli, Papo

and Romiti of the latter society, of their worries and inferences regarding the financial conditions of the undersigned, and particularly regarding the financial difficulties the undersigned would have encountered in the execution of the notorious contract for soya meal;

that the Compagnia Continentale Italiana continued with such behaviour, gravely damaging for the commercial reputation of the undersigned society, divulging such deductions and tendenticus news in the Italian cereal market, during the frequent contacts had with the economic operators of the sector, so much so that as an immediate and direct consequence of this behaviour the undersigned found immediate difficulties in the negotiation and conclusion of business with brokers and contracting parties;

that said inferences and tendentious news were continuamlly reported by the afore-said representatives of the Compagnia Continentale Italiana in the afore-mentioned circles of the operators of the cereal market, so that brokers Mr. Naggi and Dr. Villa of the firm Riccardo Rusconi & C. of Milan, Messrs Riccardo Lenzi and Gianenrico Maggi of the firm Renzo & Riccardo Lenzi of Florence, Mr. Gianni Artesani of the firm Marchetti & C. of Milan,

the Eurograin of Hamburg, as well as Dr. Enrico Causa of the firm F.lli Causa of Genoa all had same(inferences and news) brought to their direct attention and all are able to confirm by giving testimonial evidence, the propogation of the afore mentioned tendentious information;

that to this it must also be added that the behaviour of the Compagnia Continentale Italiana caused the following specific situations :

1) The firm FERRUZZI SERAFINO & C. of Ravenna, in the person of Dr. Serafino Ferruzzi, received a phone call from the Banca Commerciale Italiana of Florence which was appointed by the undersigned to effect the payment of the documents relative to 10,000 tons of the soya meal in question, loaded together with 21,000 tons of wheat onto the vessel "WORLD MARINE", as the bank was worried about rumours heard around regarding the contract with Continentale. The bank asked Dr. Ferruzzi for information and advice. Dr. Ferruzzi replied that the rumours were quite unfounded and that the Soc. Moretti was solid(stable); but in spite of this the Banca Commerciale Italiana refused to pay the undersigned's documents, requesting advances and guarantees which had never been pre-

iously requested.

2) the undersigned, having referred to other Banks, in this case to the Banco di Roma which in the past had insistently requested to finance a cargo of goods, had the bitter surprise of being refused the financing due to the tendentious inbrmation put into circulation by the Compagnia Continentale Italiana;

3) To effect the payment of the first cargo of 10.000 tons of the contract of soya meal in question, the undersigned had to refer to the Banca Toscana which, however, posed notable difficulties in the operation it was effecting, having requested and obtained very burdensome personal guarantees from Mr. Moretti, not considering any longer valid those which had always been accepted in the past by the undersigned society;

4) The soc. Montecatini-Edison of Milan with which the undersigned has worked habitually and of notable extent in the field of fertilizers and fungicides, suddenly, and as a consequence of that described above, asked to modify the terms of payment of the contracts from 30/60 days to immediate payment or even to anticipated payment, whilst the representatives of the same firm, who

previously were always in the offices of the undersigned in search of orders and contracts, began to make themselves scarce, rarefying their visits, not conceding facilitations and stipulating few contracts, for an irrelevant volume of business.

This behaviour towards the undersigned, as the same representatives and agents of the Montedison confirmed, depended solely on the rumours spread by the Compagnia Continentale Italiana on the market and at this point having reached all sectors, rumours specifically linked with the contract of soya meal in question;

to all this it must be added that the undersigned had matured, in the month of January, a credit of U.S. dollars 450,000 approx. against the mother House of the defendant today, i.e. against the Continental Grain Co. which had promised its own debt in writing with the two credit notes dated 15th January 1976 and 19th January 1976.

In spite of this, due to the intervention of the Compagnia Continentale Italiana, and thus in full convalidation of that said, and reported herein, by their functionary Mr. Renato Papo, the payment of the two credit notes was not made,

which placed the undersigned in a greater situation of difficulty, being thus left short of a sure and preventive amount of cash which was certainly not of a negligible amount;

that the undersigned pointed out this inexplicable non-fulfillment (default) to its own contracting party and to the Compagnia Continentale Italiana, informing them that should they persist in this unjustified attitude, as well as the situation of difficulty created by the Continentale Italiana on the cereal market and in financial spheres, the undersigned would be obliged to cancel the contract for the soya meal;

that in spite of this the Compagnia Continentale Italiana had a new payment, in favour of the undersigned, by the Continentale Tedesca (Conti-Deutsche Handelgeselleschaaft) for over U.S. dollars 390,000 blocked, so that the society of the afore mentioned Group was witholding U.S. Dollars 839,386.96 whilst the documents regarding the first 10,000 tons of soya meal had not yet been presented to the bank for payment;

that the undersigned, clamorously de ying the rumours and tendentious inferences spread by the Compagnia Continentale Italiana proceeded with the

payment of the documents presented by the Continental Grain Export Co. on the Irving Trust Bank of New York for the amount of U.S. Dollars 1,964,000= approx, asking the Local District Court of New York, however, for the arrest, with the afore mentioned bank, of the amount of U.S.Dollars 839,386= in guarantee of their own credit, obtaining said arrest which was carried out at the Irving Trust Co. Bank on the 18th February 1976, on the condition of the deposit of a guarantee of US Dollars 20,000 with the Court by the undersigned; that in the meantime the Compagnia Continentale Italiana had not ceased its behaviour; in fact the Administrator of that firm, Mr. Filippo Galli, informed the President of the Cerealist Association, though making no mention of the fact of the non-payment in favour of the undersigned of US Dollars 839,386.96=, that the undersigned had behaved commercially incorrectly, attempting to annul the afore mentioned soya meal contract. Having received this information Mr. Nunzio Orlandi, President of the above-mentioned Association, reported said inexact information from box to box on the Milan Grain Exchange with the immediate result that at least 80% of the operators present refused to

accept to deal even the smallest business with the undersigned;

that in spite of the arrest of the amount of US dollars 839,386.96 the Society of the Group Continental Grain persisted in their behaviour, not making the payment of the amounts owed to the undersigned so that the latter, when the date for the loading of the February quota of 5,000 tons of the soya meal contract was drawing near, pointed out to its contracting party and to the Compagnia Continentale Italiana, with telex of 23/2/1976, that as they insisted in their default, and confirming their reservations contestation and diffidence regarding the irreparable damage caused by the afore said Compagnia Continentale Italiana with the spreading of false and slanderous information, the undersigned cancelled the February quota of the contract, reserving all further rights, actions and objections;

that only at this point did the Compagnia Continentale Italiana, with telex 1/March/76, retransmit a telex from the mother House on New York in which was forumlated the rather simplified proposal to shift the loading of the 5000 tons/February to the next month, on condition of payment of the uncon-

tested and uncontestable credits of the undersigned,
as long as the undersigned undertook to totally
fulfill the residue quotas of the soya meal contract;
that the plaintiff reaffirmed with telex 4/March/76
that the question could not be resolved ignoring the
damages to same provoked by the attitude(behaviour)
taken, on the market and in the financial spheres,
by the Continentale Italiana, declaring themselves
disposed to a fair solution which therefore could
not leave out of consideration such an absorbent sit-
uation, as well as the fact that the proposed payment
of their credits had been effected only after a very
precise legal action;
that the undersigned sustained as a consequence of
the above notable patrimonial damages due to the
situation created on the cereal market, where the
undersigned saw its own possibilities of contracting
diminuish, with damages both from a contractual
point of view, of its own volume of business, as
well as unusual difficulties in its relations with
its financing Banks;
that on the above circumstances, apart from the afore
said persons, the following may be heard as witnesses:
Mr. Nunzio Orlandi of Carpi(President of the National
Cereal Association), Mr. Romano Pagnan of the firm

Pagnan & F.lli of Padova, Mr. Otello Mantovani of Verona, Messrs Edo & Martino Miserocchi of the firm Miserocchi S.p.A. of Ravenna, Mr. Antonio and Mr. Nico dal Ferro of the Soc. S.I.A.T. of Quarto D'Altino, Mr. Emilio Vandini of the Ditta Molini Vandini of Bologna, Dr. Sergio Baldacci of the Soc. Sorveglianza S.p.A. of Leghorn, as well as the representatives in Italy of some of the foreign Sellers who participated in the aforementioned meetings and in the diffusion of the illogical defamatory information, in particular acoountant Roger Chapuis of the firm TRADAX SpA of Milan, Mr. Brandt of the SAGIMP SpA of Milan, Messrs Kiat and Cicerchia of COOK International of Rome, Messrs Heimann and Pagnossin of the SOFRAG of Milan, Messrs Brocchieri and Falica of the SAROC of Milan and Messrs Ruitz(attorney) and Dr. Paolo Carpi of the GRANITAL SpA of Rome;

that in the behaviour and in the actions of the Compagnia Continentale of Rome, in the persons of its legal representatives and attorneys one notes clear facts which come under the legislative provisions of the combinate disposed by arts. 2598 nº2 and 3, 2599 and 2600 Civil Code, as well as under that provided by art. 2043 of the same code the applicability of which, in the concurrent

place in the afore-said specific provision of the law, has been admitted(granted) by the Supreme Bench(see Supreme Court, 21st August 1950n.2512 in Foro It. Mass. 1950-510);

that should, in that place where the preliminary proceedings are begun, the Instructing Magistrate, who will be appointed, find the existence of acts which identify with the grounds of any crime, he himself must remit the acts(documents) to the competent Public Prosecutor, in accordance with art. 3 of the Penal Code Procedure;

that in any case the undersigned intends to be compensated for the notable damages, both patrimonial and non-patrimonial, sustained, the amount of which will be indicated and proven during the action, against the Compagnia Continentale Italiana, as well as obtain judicial order,according to the senses of art. 2599 civil code, that the aforementioned society will cease its defamatory and allarmist behaviour against the undersigned, with consequent elimination of the damaging effects of same;

given this, having seen arts. 2598,2599,2600,2043 of the civil code and art.3 of penal code procedure

SUMMONSES

The Compagnia Continentale Italiana S.p.A. with office in Rome Via Tevre 1/A in the person of its legal representative pro tempore to appear before the Tribunal of Rome, Instructing Magistrate to be appointed, at the hearing which will be held by same in the usual chambers, Palazzo di Giustizia, on the 9 [illegible] 1976 at the usual time, there, all petitions, exceptions and deductions to the contrary rejected, to hear itself condemned to the payment of the damages sustained by the undersigned as a consequence of the acts and facts reported in the narrative, in the measure which will be indicated and proven during the action, with legal interests from the time of the request to the payment of the balance, with the request that the sentence establishing the acts of unfair competition committed by the defendant should prohibit the continuation of same and have the damaging effects ceased.

All this with the grading of costs and expenses of the action and with the request of the following preliminary means:

A) The Instructing Magistrate is requested to examine in accordance with art. 3 penal code procedure whether, in the behaviour and actions exposed

in the narrative, there exist elements which could represent a criminal offence, in which case the documents will have to transmitted to the competent Public Prosecutor for the penal action against those responsible;

B) admission of testimonial evidence, unless better and specific description of the same be given, on all the circumstances of the case exposed in the narrative of the present writ of summons with indications of eventual other witnesses as well as those indicated already in the said narrative;

C) Production of the following documents, unless there are others :

1) Contract N.V. 88723/81 between Moretto Cereali and Continental Grain Export New York

2) Credit notes 19.1.76 and 19.1.76 of the Continental Grain New York for US Dollars 233,520.00 and US Dollars 225,866.96 respectively

3) Debit note Moretti 9th February 1976 to Conti Deutsche Handelgeselleschaaft for US Dollars 390,000=

4) Copy of invoice Contigrain Export for loading of 10,000 tons of soya meal for US Dollars 1,964.911.05=

5) File, of documents and acts concerning the arrest

proceedings in New York

6) Statement of account remitted by Contigrain for relations Moretti and Society of the Conti-grain Group

7) Letter from Legal Firm Vincenzini to Continentale Italiana 14.2.76

8) Telex Moretti and Continentale Italiana for transmission to Contigrain Export 23.2.76

9) Telex Continentale Italiana to Moretti

10) Telex solicitors Vincenzini to Continentale Italiana 3/3/76

11) Telex Continentale Italiana to attorney Vincenzini 4/3/76

12) Telex Att. Vincenzini to Continentale Italiana 4/3/76

With the warning that should the summonsed not appear in accordance with the ways and terms of art. 166 civil code procedure, the case shall continue in their default(absence).

Reserving the right to all further productions and necessary oral instructory means.

Pretura Unificata di Livorno.

Il giorno 24. 3. 1976 compare avanti a me, Cancelliere della Pretura Unificata di Livorno la Sig.ra Margaret De Napoli nata a Newcastle Inghilterra il

14/5/48 e residente a Livorno, Via della Gorgona n.30, la quale chiede di poter asseverare mediante giuramento la sopra redatta traduzione dalla lingua italiana alla lingua inglese. Il sottoscritto Cancelliere la ammette al giuramento. Del che la Sig.ra Margaret De Napoli effettua pronunciando la formula di rito : "Giuro di aver ben e fidelmente adempiuto al compito affidatomi al solo scopo di far conoscere al Giudice la verità.

Livorno, il 24. 3. 1976

La Tradutrice

P. Il Cancelliere

La Segretaria

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI, S.p.A.,	:	
Plaintiff,	:	
- against -	:	76 Civ. 786 RJW
CONTINENTAL GRAIN COMPANY,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

As anticipated, defendant's sole basis for resisting partial summary judgment on the wheat contracts is its counterclaim on the soybean contract.

I.

PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE WHEAT CONTRACTS.

Defendant's opposing memorandum lumps together and confuses the district principles embodied in Rules 54(b), 56 and 62(h).

Rule 56 authorizes entry of partial summary judgment whenever the facts are undisputed and the law clear that money is due and owing from one party to another. By contrast, Rules 54(b) and 62(h) give the court discretion to consider other circumstances, such as counterclaims, so as to prevent immediate execution on the money judgment when it is in the interests of justice to do so..

There is absolutely no dispute whatever that defendant owes plaintiff certain sums of money under the wheat contracts. In his affidavit, P. Eugene Bryant, defendant's Assistant Vice President, expressly "admits to be owing the plaintiff under several several contracts for the purchase and sale of wheat identified as Exhibits D, E and H" the sum of $449,386.96. Bryant Affidavit ¶ 7.[1/]

Defendant points out that the wheat contracts were all subject to arbitration in New York. Exs. D, p. 2; E, p. 2; F, p. 2, ¶3; H, p. 2. But defendant acknowledges that it "nas not demanded arbitration under the wheat contracts". Bryant Affidavit ¶ 11. Indeed, there is nothing to arbitrate in New York under the wheat contracts. Defendant's position is simply that, depending on the outcome of the arbitration in London under

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1/ Unless otherwise indicated, all references are to the Affidavits of Remo Moretti dated July 8 and October 7, 1976 as well as Exhibits A through Q annexed thereto; the opposing Affidavit of P. Eugene Bryant dated August 2, 1976 and Exhibits 1 and 2 annexed thereto; and the opposing affidavit of Gerald P. Lepp dated August 2, 1976.

the soybean contract, the "ultimate balance" between the sums concededly owed by defendant to plaintiff under the wheat contracts, and the disputed sums claimed to be owed by plaintiff to defendant under the soybean contract, "will be determined by the London arbitration." Bryant Affidavit ¶11.

Under these circumstances, whatever the court may decide concerning whether execution of judgment should be stayed, there is no justification at all for denying entry of partial summary judgment in plaintiff's favor under the wheat contracts. If this diversity case had been brought in a state court, plaintiff would have been entitled to judgment. See Pease & Elliman v. 926 Park Ave. Corp., 17 N.Y.2d 890 (1966), aff'g 23 A.D.2d 361, 260 N.Y.S.2d 693 (1st Dep't 1965); Accord Farmers Cooperative v. Levine, 36 A.D.2d 656, 318 N.Y.S.2d 68 (3d Dep't 1971); Petikas v. Atco Marine Corp., 31 A.D.2d 907, 298 N.Y.S.2d 288 (1st Dep't 1969). The same principle applies in this court. Schroeter v. Ralph Wilson Plastics, 49 F.R.D. 323 (S.D.N.Y. 1969).

II.

JUDGMENT SHOULD BE CERTIFIED AS FINAL AND NOT STAYED SINCE THE ASSIGNMENT IS INVALID.

As indicated, the entry of partial summary judgment under Rule 56 has nothing to do with defendant's counterclaim.

However, the status of the counterclaim is relevant to determinations of whether the partial summary judgment should be certified as final under Rule 54(b) or otherwise stayed under Rule 62(h).

The counterclaim is founded not on a contract between plaintiff and defendant, but rather on a contract between plaintiff and another corporation, Continental Grain Export Corporation. Ex. L. Defendant seeks to avoid this hard fact by alleging that it received an assignment of the counterclaim from its corporate affiliate. Bryant Affidavit ¶ 9.

To begin with, the sums due plaintiff under the wheat contracts were acknowledged by defendant to be owing on January 15 and 19, 1976. Exs. G & I. Plaintiff actually performed under the soybean contract after those dates, paying Continental Grain Export nearly $2,000,000 for a portion of the soybean meal shipped on January 30. Moretti Oct. Affidavit ¶ 7 & Ex. N. Continental Grain Export did not claim that a breach of that contract occurred until February 10. Bryant Affidavit ¶ 8 & Ex. 2. Plaintiff brought suit herein on February 18. Moretti July Affidavit ¶ 5 & Ex. A. The alleged assignment from Continental Grain Export to plaintiff did not occur until March 2 (Bryant Aff. ¶ 9) and London arbitration of the dispute under the soybean contract was first demanded only on March 17, some two months after the sums under the wheat contracts were conceded to be due and owing.

Lepp Affidavit ¶ 2. Continental Grain Export's debit note, setting forth the sums claimed to be due from plaintiff, was dated April 22. Ex. 2.

The assignment document is missing from the record because defendant has not chosen to submit it as an exhibit. In plaintiff's moving papers (Memo p. 5), it was asserted that the assignment had been given without consideration and solely for the purposes of this litigation. Defendant has not denied those assertions. Indeed, it may be noted that two weeks after the alleged assignment, the London arbitration was commenced not by defendant but rather by Continental Grain Export itself. Lepp Affidavit ¶ 2. The assignment, then, was transparently given solely for the purpose of enabling defendant to allege a counterclaim in this action. Cf. Pumice Aggregates v. Lep Chartering, [1976] 1 Ll. L. Rep. 529 (C.A. 1975).

In this diversity suit, the validity of the assignment is governed by state law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); American Optical Co. v. Curtiss, 56 F.R.D. 26, 29 (S.D.N.Y. 1971).

The assignment having been made without consideration and solely for the purpose of litigation, it is invalid under Section 489 of the New York Judiciary Law which provides, in pertinent part, that "no corporation * * * directly or indirectly * * * shall * * * take an assignment * * * of a * * *

book debt, or any other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon." When such an assignment has been taken, the courts, both state and Federal, have held that the cause of action should be dismissed. American Optical Co. v. Curtiss, 56 F.R.D. 26 (S.D.N.Y. 1971); American Restaurant China Mfrs. Ass'n. v. Corning Glass Works, 24 M.2d 634, 198 N.Y.S. 2d 366 (Sup. Ct. 1960). The same rule applies to assignments between affiliated corporations. Bennett v. Supreme Enforcement Corp., 275 N.Y. 502 (1937), aff'g 250 A.D. 265, 293 N.Y. Supp. 870 (1st Dep't 1937).

It may be noted that collusive assignments between affiliated corporations for purposes of litigation are likewise not favored under Federal law. 28 U.S.C. § 1359; Prudential Oil Corp. v. Phillips Petroleum Co., ___ F.2d ___ (2 Cir. Dkt. No. 76-7207, Dec. 1, 1976); Green & White Constr. Co. v. Cormat Constr. Co., 361 F. Supp. 125 (N.D. Ill. 1973); cf. Kramer v. Caribbean Mills, 394 U.S. 823 (1969).

Here, in violation of Section 489, defendant took an assignment of Continental Grain Export's claim solely in order to interpose a counterclaim in this action. It may be that there are tax reasons for defendant and Continental Grain Export to conduct business as two distinct corporate entities. But defendant cannot have it both ways -- relying on separate

corporate identity when it suits defendant's purposes and ignoring such identity when deemed desirable to secure other advantages. The collusive assignment from Contintental Grain Export to defendant solely for purposes of litigation was illegal. Defendant should not be permitted to avail itself of such an illegal transaction as a means of avoiding enforcement of a judgment for sums concededly owed to plaintiff even before the counterclaim arose.

III.

EVEN IF THE ASSIGNMENT WERE VALID, JUDGMENT SHOULD BE CERTIFIED AS FINAL AND NOT STAYED.

Defendant, relying upon the assignment, raises a number of scattered arguments in an effort to avoid enforcement of the judgment for the sums concededly owed to plaintiff. Even if the assignment were valid, none of defendant's arguments would warrant a stay of execution.

A. Defendant's allegations of a "running account" are totally unsupported.

Defendant argues that the parties have established a "running account" and that the "balance" in the account cannot be determined until the dispute under the soybean contract is resolved. The argument is absolutely ingenuous; it appears to have substance but is, in reality, legerdemain.

At the outset, it is necessary to focus on the peculiar nature of this alleged running account. All grain trading contracts, including every one before the Court, and the rules of both major international grain trading associations, require immediate payment of cash against presentation of documents evidencing shipment of the grain. Exs. D, E, F, H, J, K, L, M and Moretti Oct. Affidavit ¶ 2. Defendant does not dispute this universal practice.

Instead, defendant alleges that such a running account is established by custom only when a grain trading contract "is performed other than by physical delivery of the goods." Bryant Affidavit ¶ 6. In other words, defendant alleges the existence of a running account solely for contracts which are cancelled or washed out.

Defendant's sole proof of such a running account here are its own "credit notes" and a "debit note" issued by Continental Grain Export. Exs. G, I & 2. Defendant bootstraps an argument that the parties had established an account because each note recites that a "credit" or "debit" had been made to "your account."

No doubt defendant and Continental Grain Export made appropriate notiations on their books of account or other financial records concerning the sums concededly owed to plaintiff or claimed to be due from plaintiff. But the manner in which defendant and Continental Grain Export keep their books

and records is hardly evidence of an agreement that plaintiff authorized defendant to retain indefinitely all sums of money due to plaintiff from circle washouts. The wheat contracts contain no such provision. Exs. D, E, F, H. Indeed, article 23 of GAFTA Form No. 119, which governed the soybean contract between plaintiff and Continental Grain Export, expressly contradicts the existence of such an arrangement by requiring payment of circle washouts "not later than 30 consecutive days after the last day for tendering." Ex. M. While the corn contracts between plaintiff and defendant's German corporate affiliate are not a subject of this motion practice, it may be noted that the corn contract washout likewise expressly provided for payment within a specified time. Ex. K.

In the face of the contrary provision found in the soybean contract, defendant's bare allegation of a "custom" of running accounts is insufficient to raise a triable issue, particularly since the wheat transactions were the very first ones between the parties involving circle washouts (Moretti Oct. Aff. ¶ 8), and there was not, therefore, any prior dealings from which the existence of a running account might properly be inferred.

Perhaps most significantly, if there had been a running account, Continental Grain Export should have asserted a claim in the London arbitration only for the net balance due. But

Continental Grain Export did nothing of the sort. It pressed for the entire amount claimed under the soybean contract, never mentioning the wheat contracts at all, and recently received a preliminary award for the full amount claimed. Ex. O.

In short, defendant has submitted no evidence at all that plaintiff had acquiesced in the establishment of a peculiar running account covering just cancelled contracts between plaintiff, on the one hand, and defendant plus Continental Grain Export on the other. Pumice Aggregates v. Lep Chartering, [1976] 1 Ll. L. Rep. 529 (C.A. 1976).

B. Enforcement of the judgment will dispose of the suit.

In its opposing papers defendant asked for a stay of this suit pending the outcome of the arbitration in London and implied that once the arbitration was completed, this suit would be ripe for speedy disposition. Again, defendant's argument is predicted on an assumed validity of its assignment.

But even if the assignment were valid, no purpose would be served in tying up the docket of this Court pending the outcome of the London proceedings. First, defendant has never suggested that it required or was entitled to security on the unrelated counterclaim being prosecuted in another forum. Petikas v. Atco Marine Corp., 31 A.D.2d 907, 298 N.Y.S.2d 288 (1st Dep't 1969); Pease & Elliman v. 926 Park Ave. Corp., 23 A.D.2d 361, 260 N.Y.S.2d 693 (1st Dep't 1965), aff'd, 17 N.Y.2d 890 (1966).

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Second, this suit is in reality the smallest part of global litigation between the parties which will almost certainly drag on for many years if not a decade. To be sure, defendant has received a preliminary London arbitration award in its favor. Ex. O. But under article 8 of the GAFTA Arbitration Rules, the award is subject to an appeal to the GAFTA Board of Appeal. Ex. P. Plaintiff is taking such an appeal. Moretti Oct. Affidavit ¶ 10. Thereafter, under English law, either party may seek review in the High Court of Justice to rectify errors of law by the arbitrators. English Arbitration Act, 1950, 14 Geo. 6, c.27, § 21.[2/]

In addition, in late March 1976, plaintiff brought suit in the Civil Court of Rome, Italy against Compagnia Continentale Italiana, yet another of defendant's corporate affiliates, for disparagement and defamation in connection with all of the wheat and soybean contracts. Ex. Q. A preliminary hearing for the taking of testimony in February 1977 was ordered by the Italian court last week.

The issues raised in the London aribtration and the Rome suit are, at best, only casually related to the proceedings before this Court. Defendant has not shown that any prejudice would result if the proceedings here were brought to a prompt conclusion. Defendant has certainly not established any legi-

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2/ The English practice differs from our own under which arbitration awards are not subject to review for errors of law. I/S Stavborg v. National Metal Converters, 500 F.2d 424, 427-32 (2 Cir. 1974).

timate basis for holding the suit here in abeyance until all of the foreign proceedings, involving different issues and different parties, have been terminated after all appeals.

By contrast, the entry of an enforcible judgment on the two wheat contracts will effectively dispose of this case. To be sure, plaintiff's third cause of action under the corn contracts still remains unresolved, but defendant denies that it is liable for the corn contract washout and if enforcement of plaintiff's judgment is not stayed, plaintiff will voluntarily dismiss the corn contract claim without prejudice, so it may pursue its remedies in Germany or elsewhere directly against defendant's German corporate affiliate. As for defendant's counterclaim, if the assignment is invalid, the counterclaim is subject to dismissal. In any event, there would be no practical reason for defendant to pursue its counterclaim against this Italian plaintiff both here and in London. If defendant refused to dismiss the counterclaim voluntarily, a transfer to the Supense Docket would in all likelihood be the last the Court would hear of it.

In short, not only is a stay of enforcement of plaintiff's judgment unwarranted, but a denial of the stay would have the salutary effect of clearing this entire matter from the Court's calendar.

CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment sould be granted and the judgment should be certified as final.

Very respectfully,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff
One Battery Park Plaza
New York, New York 10004
HAnover 2 - 7585

MICHAEL MARKS COHEN,

ROBERT J. ZAPF,

Of Counsel

ASSIGNMENT OF CONTRACT

KNOW ALL MEN BY THESE PRESENTS, THAT:

WHEREAS, CONTINENTAL GRAIN EXPORT CORPORATION ("Assignor"), as Sellers, entered into a Contract dated November 15, 1974, for the sale of 50,000 tons of soybean meal by Contract No. V-88723/81 U (the "Contract") with FLLI. MORETTI CEREALI S.P.A., as Buyers, a copy of which is attached, marked Exhibit A; and

WHEREAS, Assignor desires to assign all right, title and interest under the Contract including, but not limited to, all moneys due or that may become due under the same; and

WHEREAS, CONTINENTAL GRAIN COMPANY ("Assignee") desires to acquire all right, title and interest in the Contract;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. That in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration paid to the Assignor by the Assignee, the receipt of which is hereby acknowledged, the Assignor does transfer and assign to the Assignee all right, title and interest in and to the Contract, and all of Assignor's rights and remedies under the Contract.

2. Assignor constitutes Assignee as Assignor's true and lawful attorney, irrevocably, with full power (in the name of Assignor or otherwise); to sue for, ask, require or demand any and all money or claims for money due or to become due arising out of the Contract; and to file any claim or to take any action or

institute any proceeding including arbitration which Assignor deems necessary in connection with the Contract and the enforcement of rights thereunder.

IN WITNESS WHEREOF, Assignor has caused the Assignment to be executed, at New York, New York, by its duly authorized officer as of the 2nd day of March, 1976.

CONTINENTAL GRAIN EXPORT COPPORATION

By John G. Reed, Jr.
JOHN G. REED, JR.
Vice President

K-2477

K-2477 Pleadings

U.S. DISTRICT COURT FILED FEB 1 1977 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FLLI MORETTI CEREALI, S.p.A.,

Plaintiff,

-against-

CONTINENTAL GRAIN COMPANY,

Defendant.

----------x

76 Civ. 786
R.J.W.

Plaintiff moves pursuant to Rules 54(b) and 56, Fed. R. Civ. P., for partial summary judgment on its first and second causes of action. For the reasons hereinafter stated, the motion is granted. In addition, the Court sua sponte grants summary judgment dismissing defendant's counterclaims ~~on the fourth cause of action~~.

2/3/77 R.J.W.

This action concerns four grain transactions, only three of which are relevant to this motion.[1] The first two transactions involve contracts for the purchase and sale of wheat, the subject of the first and second causes of action on which plaintiff moves for summary judgment. The other relevant transaction involves a soybean contract between plaintiff and defendant's affiliate, Continental Grain Export Corporation (hereinafter "the affiliate"). Alleging that the latter contract was assigned to it by the affiliate, defendant counterclaims on this contract for an amount exceeding

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plaintiff's claimed damages. This soybean contract is also related to the defense asserted to the first and second causes of action.

There is no dispute that in connection with the wheat contracts defendant owes plaintiff $449,386.96, the damages sought under the first and second causes of action. However, defendant argues that this conceded debt is not currently due because the parties allegedly have a running account,[2] the ultimate balance of which cannot be determined until an arbitration in London concerning the soybean contract, and brought on by the affiliate, is concluded.

Even under defendant's running account theory, if there are no debits in defendant's favor, it would be liable for credits therein. The only debit asserted to be in its favor is the amount allegedly owing defendant on the soybean contract. However, that debit is owed defendant only if the assignment of the soybean contract to it from its affiliate on March 2, 1976, two weeks after plaintiff filed this action, is valid. Thus, if the soybean contract were not validly assigned, there would be no debits in the running account and the total credits therein would be due plaintiff. Accordingly, the Court now turns to an examination of the validity of the assignment.

Since this is a diversity action, the validity of the assignment is a matter of New York law. Erie R.R. v.

Tompkins, 304 U.S. 64 (1938). Under New York law, an assignment is invalid if it is not part of a substantial commercial transaction and the primary purpose of it is to enable the assignee to commence suit thereon. See Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 N.Y.2d 325, 330, 321 N.Y.S.2d 857, 860-61 (1971).

The language of the assignment is, of course, an important factor in determining its purpose. The assignment in question states in pertinent part:

> Assignor constitutes Assignee as Assignor's true and lawful attorney, irrevocably, with full power . . . to file any claim or to take any action or institute any proceeding including arbitration which Assignor deems necessary in connection with the contract and the enforcement of rights thereunder.
> (Emphasis added)

The characterization of the assignee as the assignor's attorney and the assignor's reservation of the right to determine whether the assignee should take any legal action on the contract is totally inconsistent with the purported intent of the assignor to give up all right, title and interest in the soybean contract. Moreover, the clear import of such language is that the primary purpose of the assignment was to enable the assignee to bring an action on the contract. This renders the assignment invalid, American Optical Co. v. Curtiss, 56 F.R.D. 26, 30-31 (S.D.N.Y. 1971),

and the fact that the assignor and assignee are affiliated corporations does not cure this defect. Bennett v. Supreme Enforcement Corp., 275 N.Y. 502, 11 N.E.2d 315 (1937).

Likewise, the conduct of the assignor (the affiliate) and the assignee (defendant) subsequent to the alleged assignment belies the validity of it. On March 17, 1976, two weeks after the alleged assignment, the assignor, with the assignee's knowledge, commenced and thereafter successfully prosecuted to a preliminary award, an arbitration proceeding, in London, on the soybean claim. This conduct is inconsistent with the assignor's purported intent to transfer all right, title and interest in the soybean claim.

Furthermore, plaintiff has expended and continues to expend time, expense and effort in its defense of the arbitration proceeding. It would be inequitable to allow the assignee who sat back and watched the assignor assert rights under the soybean contract to now assert those same rights on the basis of an alleged assignment of that contract prior to the arbitration. To do so would give defendant two bites at the apple and would cause plaintiff to suffer substantial detriment in having to twice defend the same claim in two distant forums.

Lastly, defendant never denied plaintiff's assertion that the assignment was without consideration and was solely for purposes of bringing suit on the contract.

Thus, defendant does not raise any genuine issue of fact as to the invalidity of the affiliate's assignment of the soybean contract to defendant. Accordingly, the Court finds that defendant has no right, title or interest in the soybean contract, and, therefore, defendant has no claim to a debit to set off against the credits concededly owed plaintiff on the wheat contracts. Consequently, even if there were a running account, the existence of which this Court need not decide, the absence of a setoff in defendant's favor negates defendant's running account defense to plaintiff's motion for summary judgment on the first and second causes of action. Plaintiff's motion is, therefore, granted.

Furthermore, although plaintiff has not moved to dismiss defendant's counterclaim, it is apparent that, since defendant has no right, title or interest in the already arbitrated soybean contract, it cannot sue on that contract here. Accordingly, the defendant's counterclaim is dismissed by the Court sua sponte.

The only question remaining is whether the judgment should be certified as final under Rule 54(b), Fed. R. Civ. P., and not stayed under Rule 62, Fed. R. Civ. P. Inasmuch as summary judgment has been granted in plaintiff's favor on the first and second causes of action and on defendant's counterclaim, ~~and fourth causes of action~~, and plaintiff has indicated that it will voluntarily dismiss the third cause of action and litigate it elsewhere, there is no reason why a

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final judgment should not be certified on the first, second and ~~and fourth~~ causes of action and on the counterclaims. Likewise, a stay of enforcement of plaintiff's judgment would be inappropriate.

Settle judgment on notice.

Dated: January 31, 1977

Robert J. Ward
U. S. D. J.

NOTES

1 The fourth transaction involved contracts for the purchase and sale of corn, the subject of the third cause of action alleged in the complaint. Plaintiff's motion does not concern this transaction.

2 All of the wheat contracts have separate provisions calling for, in general, payment against presentation of shipping documents. These payment provisions are not modified by any provision in the wheat contracts calling for a running account. Rather, defendant contends that there is a trade usage among major grain companies whereby contracts performable otherwise than by physical delivery of grain, for example by "wash-outs" and "circle settlements" as in the case of these wheat contracts, become part of a running account. As will be explained later, it is unnecessary for the Court to reach the questions of: whether New York rules governing interpretation of contracts permit defendant to attempt to supplement or vary the contract by evidence of such a trade usage, see J. Calamari & J. Perillo, Contracts §52 (1970); if so, whether defendant has proven the existence of such a trade usage; and, if so, whether the course of dealing and/or course of performance between these parties would support the inference that the parties contracted with this purported trade usage in mind. Without actually reaching these questions, the Court notes for the record that given these hurdles and the facts of this case, the Court has grave doubts that defendant raises a genuine issue of fact as to the existence of a running account.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

FLLI MORETTI CEREALI S.p.A., :

Plaintiff, : 76 Civ. 786 RJW

- against - :

ORDER

CONTINENTAL GRAIN COMPANY, :

Defendant. :

- -X

On the subjoined consent of the parties, it is hereby

ORDERED that the third cause of action in the Complaint be and hereby is DISMISSED without prejudice.

Dated: New York, New York
February 7, 1977

RJW
USDJ

We consent to entry
of this Order

BURLINGHAM UNDERWOOD & LORD
Attorneys for Plaintiff

By _____

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant

By _____

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Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1978

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Bigham, Englar, Jones & Houston

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLLI MORETTI CEREALI S.p.A.,

Plaintiff,

- against -

CONTINENTAL GRAIN COMPANY,

Defendant.

76 Civ. 786 RJW

JUDGMENT # 77267

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The opinion of the Court having been rendered herein on January 31, 1977, and filed February 1, 1977; and there being no just reason for delay, pursuant to Rule 54 of the F.R.C.P. it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff Flli Moretti Cereali, S.p.A. recover from defendant Continental Grain Company on the first cause of action in the complaint the sums of $223,520.00, plus interest thereon at 6% per annum from January 15, 1976 through February 7, 1977, being $14,253.98; and on the second cause of action in the complaint the sums of $225,866.96, plus interest thereon at 6% per annum from January 19, 1976 through February 7, 1977, being $14,255.54; which sums in the aggregate total $477,896.48; and it is further

ORDERED, ADJUDGED and DECREED that the counterclaim in the answer be and hereby is DISMISSED with prejudice to defendant Continental Grain Company but without prejudice to the pending arbitration proceedings in London, England between plaintiff and Continental Grain Export Corporation.

Dated: New York, New York
February 7, 1977

RJW
U.S.D.J.

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